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In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625, provides that the "authorities * * * being exercised" with respect to a country on July 1, 1977, under Section 5(b) of the Trading With the Enemy Act may continue to be exercised with respect to that country thereafter. On July 1, 1977, Treasury Department regulations prohibited all unlicensed property transactions related to Cuba, and a general license authorized certain travel-related transactions involving Cuba. The question presented is whether, under Section 101(b), the President may narrow the terms of this general license and restrict travel-related property transactions involving Cuba.

PARTIES TO THE PROCEEDINGS

In addition to Donald Regan, Secretary of the Treasury, the following are also petitioners: John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations; Dennis M. O'Connell, Director, Office of Foreign Assets Control, Department of the Treasury; George P. Shultz, Secretary of State; and Ronald Wilson Reagan, President of the United States. In addition to Ruth Wald, the following are also respondents: Marian Lowe, Rosario Morales, Francis E. Bradley, Reverend Alice Hageman, Cuba Resources Group, Robert C. Howard, Center for Cuban Studies, and Linda Turner.

Intervening plaintiffs in the district court were Puerto Rico Olympic Committee and Rafael Morales Cabranes, on his own behalf and on behalf of the Asociacion de Turistas Olimpicos de Puerto Rico (Atoprico), and other Puerto Rican sports fans. The intervening plaintiffs did not participate in the court of appeals.

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v.

RUTH WALD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Secretary of the Treasury and the other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-14a) and the memorandum of the court of appeals accompanying its order denying rehearing (App. B, *infra*, 15a-19a) are reported at 708 F.2d 794. The order of the district court denying a motion for preliminary injunction (App. E, *infra*, 22a-23a) and the magistrate's report recommending denial of the motion for preliminary injunction (App. F, *infra*, 24a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 21a) was entered on May 16, 1983. A timely petition for rehearing was denied on June 16, 1983 (App. C, *infra*, 20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are reproduced in App. H, *infra*, 46a-56a.

STATEMENT

1. For many years the United States has not enjoyed cordial, normal relations with the Government of Cuba; and the management of relations with Cuba has posed some of the most difficult, sensitive and troublesome foreign policy problems presented to our government.[1] It is a longstanding objective of the United States to deter conduct by the Cuban Government that is inimical to foreign policy interests of the United States and its allies, particularly Cuban attempts to subvert and destabilize governments in Central America and the Caribbean region.[2] To

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[1]Declaration of Myles R.R. Frechette, Director, Office of Cuban Affairs, Department of State ¶ 4 (C.A.J.A. 103). A principal objective of the Cuban Government has been the overthrow of non-Communist governments in the western hemisphere and their replacement with regimes acceptable to Cuba. Declaration of Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs ¶ 5 (Attachment E to Application for Stay). In particular, since 1978 Cuba, with the political, economic, and military support of the Soviet Union, has provided widespread support for armed violence and terrorism in the western hemisphere; in addition, Cuba maintains close to 40,000 troops in various countries in Africa and the Middle East in support of objectives inimical to United States foreign policy interests. Frechette Declaration, *supra* ¶ 4 (C.A.J.A. 103).

The declaration of Mr. Frechette was submitted to the district court in connection with the government's response to respondents' motion for preliminary injunction. The declarations of Assistant Secretary Enders and other government officials, which update and expand declarations submitted to the district court, were filed in the court of appeals and in this Court in connection with the government's applications for stay of the mandate. We draw on these declarations in explaining the history and purpose of the Cuban embargo and the regulations at issue here. Copies of the declarations appear in either the joint appendix filed by the parties in the court of appeals or as attachments to our application for stay of mandate in this Court, filed June 23, 1983.

[2]Declaration of James H. Michel, Acting Assistant Secretary of State for Inter-American Affairs ¶ 3 (Attachment C to Application for

further this objective, the United States, in coordination with other countries in the western hemisphere,[3] imposed an extensive system of sanctions against the Cuban Government. A critical element in this system has, since 1963, been a wide-ranging embargo on trade and other economic transactions between Cuba and Cuban nationals, on the one hand, and persons subject to the jurisdiction of the United States, on the other.[4] The embargo has served to give the United States leverage over Cuban conduct.[5] By restricting Cuban access to hard currency, the embargo has also contributed to our nation's efforts to limit Cuba's ability to finance destabilizing activity in Central America and the Caribbean region and has dissociated the United States from such Cuban ventures.[6] Over the last 20 years, the President has adjusted the embargo on a number of occasions, through amendment of the Cuban Assets Control Regulations issued by the Department of the Treasury, 31 C.F.R. Part 515; the embargo has been used as a flexible instrument of foreign policy, sensitive to the particular state of relations between the United States and Cuba.[7]

2. The Executive has imposed the Cuban embargo pursuant to authority granted under the Trading With the Enemy Act of 1917 ("TWEA"), 50 U.S.C. App. (& Supp. V) 1 *et seq.* Prior to its amendment in 1977, Section 5(b) of the TWEA, 50 U.S.C. App. 5(b), gave the President, "[d]uring

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Stay); Enders Declaration, *supra* ¶ 5; Frechette Declaration, *supra*, ¶ 4 (C.A.J.A. 103).

[3]The United States acted in accord with, *inter alia*, Resolution VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs acting under the Inter-American Treaty of Reciprocal Assistance (Jan. 31, 1962) and Resolution I of the Ninth Meeting of Consultation of Ministers of Foreign Affairs (July 22, 1964), *reprinted in*, II *Inter-American Treaty of Reciprocal Assistance Applications, 1948-72*, at 77-78, 215-216 (General Secretariat, Organization of American States 1973). See *Zemel* v. *Rusk*, 381 U.S. 1, 14-15 & n.15 (1965).

[4]Enders Declaration, *supra* ¶ 6; Declaration of John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations, ¶ 3 (Attachment E to Application for Stay).

[5]Michel Declaration, *supra* ¶ 3.

[6]*Ibid.*; Walker Declaration, *supra* ¶ 3.

[7]See page 20 & note 32, *infra*.

the time of war or during any other period of national emergency declared by the President," broad authority:

> under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise [to]—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, * * *.[8]

In 1977 Congress enacted Pub. L. No. 95-223, 91 Stat. 1625, *et seq.* which amended the statutory scheme governing the President's exercise of emergency economic powers. Title I of Pub. L. No. 95-223, 91 Stat. 1625, amended the TWEA so as to confine to periods of war the President's broad TWEA authority to regulate transactions and property with respect to a foreign state or national; the effect was generally to withdraw the President's authority to exercise TWEA powers during peacetime periods of declared national emergency. Title II of Pub. L. No. 95-223, 91 Stat. 1626, known as the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. (Supp. V) 1701 *et seq.*, established a new statutory framework for the President's exercise of economic powers during periods of national emergency.[9] Under IEEPA, the President's authori-

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[8]Violation of regulations promulgated under the TWEA constitutes a felony punishable by imprisonment of not more than 10 years and/or a fine of not more than $50,000. 50 U.S.C. (Supp. V) App. 16. There are no civil penalties for violation of the regulations.

[9]IEEPA established new procedures for exercising emergency authorities. Under the TWEA, the existence of any declared emergency

ty to exercise economic powers during times of peace are limited to "deal[ing] with any unusual and extraordinary threat, which has its source * * * outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such a threat." 50 U.S C. (Supp. V) 1701.[10]

However, Congress was careful to provide for continuation of presidential authority under Section 5(b) of the TWEA to exercise economic powers in connection with previously declared peacetime national emergencies. Congress expressly determined that the President should not be required to declare a *new* national emergency in order to continue an *existing* embargo; it decided that the President should be permitted to continue under the old statutory scheme the embargoes that were in effect at the time the new legislation was being considered. Thus, it included in Title I of Pub. L. No. 95-223, 91 Stat. 1625, a "grandfather

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was a sufficient predicate for exercise of any of the authorities provided under the Act. The National Emergencies Act, 50 U.S.C. 1601 *et seq.*, enacted in 1976, terminated all authorities possessed by the President as a result of existing national emergencies (except for authorities under Section 5(b) of the TWEA) and established new procedures governing the declaration of national emergencies. Under IEEPA, the President must declare a new national emergency with respect to a specific threat before initiating the exercise of emergency economic powers. 50 U.S.C. (Supp. V) 1701. In addition, the President must consult with Congress before and during the exercise of IEEPA authorities and report to Congress at the time he begins to exercise such authorities and every six months thereafter. 50 U.S.C. (Supp. V) 1703. Under both IEEPA and the National Emergencies Act, Congress purported to retain the power to terminate a declared national emergency and to cut off the use of emergency authorities by concurrent resolution. 50 U.S.C. (& Supp. V) 1622, 1706(b).

[10]With certain limitations not directly relevant here, the President has the same broad powers under the IEEPA that he had under the TWEA. See Staff of House Comm. on International Relations, 95th Cong., 1st Sess., *Markup on Revision of Trading With the Enemy Act* 4 (Comm. Print 1977) (statement of Rep. Bingham). (This committee print and other legislative materials relating to the 1977 amendment to the TWEA are reproduced in a Legislative History Appendix filed by the parties in the court of appeals.)

clause," which preserves the Section 5(b) authorities being exercised with respect to a country as of July 1, 1977. Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625, provides (emphasis added):

> [*T*]*he authorities conferred upon the President by section 5(b)* of the Trading With the Enemy Act *which were being exercised with respect to a country on July 1, 1977*, as a result of a national emergency declared by the President before such date, *may continue to be exercised with respect to such country*, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [September 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

Pursuant to the grandfather clause, Presidents Carter and Reagan have in every year since 1978 determined that it is in the national interest to continue the exercise of TWEA authorities with respect to Cuba and certain other countries.[11]

3. Pursuant to the President's broad authority under Section 5(b) of the TWEA, *inter alia*, to "regulate * * * prevent or prohibit * * * any transfer * * * of * * * or transactions involving, any property in which any foreign country or a national thereof has any interest," the Cuban Assets Control Regulations have, since 1963, prohibited, "except as specifically authorized by the Secretary of the Treasury * * * transactions involv[ing] property in which [Cuba] has * * * any interest of any nature whatsoever, direct or indirect * * * [including] * * * [a]ll dealings in

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[11]See, *e.g.*, 47 Fed. Reg. 39797 (1982); 46 Fed. Reg. 45321 (1981); 45 Fed. Reg. 59549 (1980); 44 Fed. Reg. 53153 (1979); 43 Fed. Reg. 40449 (1978).

* * * any property * * * by any person subject to the jurisdiction of the United States * * *." 31 C.F.R. 515.201(b); 28 Fed. Reg. 6975 (1963).[12] The effect of these regulations is to subject *all* property transactions related to Cuba to a comprehensive regulatory licensing regime. The regulations block all assets of Cuba or Cuban nationals; they prohibit persons subject to United States jurisdiction from engaging directly or indirectly in *unlicensed* commercial or other economic transactions of any kind with Cuba or Cuban nationals. The regulations provide that any regulation or license "may be amended, modified, or revoked at any time" (31 C.F.R. 515.805; 28 Fed. Reg. 6985 (1963)), and that "[a]ny transfer * * * which is in violation of any provision of this chapter or of any regulation * * * license or other direction or authorization * * * and involves any property in which a designated national has or has had an interest * * * is null and void * * *" (31 C.F.R. 515.203(a); 28 Fed. Reg. 6975 (1963)). *These regulations were in force on July 1, 1977, and continue in force today.*

Travel-related property transactions that inure to the benefit of Cuba or a Cuban national have been covered by the provisions of the Cuban Assets Control Regulations since 1963.[13] In March 1977, as part of President Carter's

[12]"Property" is defined to include, *inter alia*, "money, checks, drafts, * * * debts, indebtedness obligations, * * * contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent" (31 C.F.R. 515.311; 28 Fed. Reg. at 6977). "Transfer" is defined to include "any * * * transaction * * * whether or not done or performed within the United States, the purpose, intent, or effect of which is to * * * surrender, release, [or] transfer * * * any * * * interest with respect to any property * * * includ[ing] the making, execution, or delivery of any * * * check * * *" (31 C.F.R. 515.310; 28 Fed. Reg. at 6976-6977).

[13]The payment of funds directly to Cuba or Cuban nationals for meals, lodging or transportation represents the discharge of an indebtedness for goods or services provided and thus is a transaction with respect to property in which Cuba has an interest, as is payment of funds to non-Cuban entities (*e.g.*, an airline) that in turn remit proceeds to Cuba or pay fees to Cuba. Since imposition of the Cuban embargo in 1963 the Treasury Department has viewed the broad prohibition set

efforts to improve relations with Cuba, the Department of the Treasury promulgated 31 C.F.R. 515.560 (1977), 42 Fed. Reg. 16621 (1977),[14] which constituted a general license authorizing many financial transactions incident to travel to and within Cuba. Under this license persons who visited Cuba were authorized to pay for their transportation and maintenance expenses (*e.g.*, meals, hotel bills, taxis) while in Cuba. They were, however, not permitted to buy and bring back to the United States more than $100 worth of Cuban goods for personal use. 31 C.F.R. 515.560(a)(3) (1977). The regulations expressly prohibited domestic credit card issuers from entering into contracts with Cuban enterprises for issuing credit to travelers. 31 C.F.R. 515.560(a)(7) (1977).

In late 1981, it became apparent to the United States that the Cuban Government was increasing its efforts to destabilize Central American governments and at the same time was initiating a program to increase its hard currency earnings through expansion of its tourism industry, particularly by attracting tourists from the United States.[15] In May 1982, in order to "reduce Cuba's hard currency earn-

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out in 31 C.F.R. 515.201 as applying to travel-related property transactions involving Cuba. See page 16 & note 26, *infra*.

[14]31 C.F.R. 515.560(a) (1977) provided in part:

> The following transactions are authorized:
>
> (1) All transactions ordinarily incident to travel to and from Cuba.
>
> (2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.
>
> (3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person, for personal use only. Such merchandise may not be resold. The authorization in this subparagraph may only be used once in every six consecutive months.

[15]Michel Declaration, *supra* ¶ 6. For example, the Director for United States Affairs of the Cuban National and International Tourist Enterprise had requested visas for December 1981 and January 1982 visits to New York and Miami to meet 30 to 40 American travel agents for the purpose of promoting tourism to Cuba. In addition, the American Society of Travel Agents had inquired on behalf of Cuba whether Cuba could present an exhibition promoting travel to Cuba at the Society's 52nd World Travel Congress in Miami, October 10-16, 1982. Fol-

ings from travel by United States persons to and within Cuba," the Department of the Treasury amended 31 C.F.R. 515.560 to modify the general license for travel-related financial transactions involving Cuba. 47 Fed. Reg. 17030 (1982).[16] It is this modification that is at issue here. As amended, Section 515.560 provides that the general license to engage in travel-related transactions is limited to persons engaged in official travel, visits to close relatives, travel completely hosted by Cuba (*i.e.*, travel that does not involve economic benefit to Cuba), and travel related to news-gathering, professional research, or similar activities. The amended regulation also provides that specific licenses may be granted in the case of travel for humanitarian reasons or for purposes of public performances in Cuba in connection with cultural or sports events. The general effect of the amendments was to rescind those portions of the 1977 general license that authorized transactions incident to business and tourist travel.

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lowing the 1977 relaxation of licensing for travel-related financial transactions Cuba began to develop plans for a tourist complex on Cayo Largo, and possibly on two other cays, offering gambling casinos and other special attractions. A 1981-1985 five year plan called for inaugurating 22 new hotels with 2,800 rooms and recovering or improving an additional 6,900 rooms. By legislative decree, joint ventures with foreign ownership were authorized in order to attract foreign hard currency investments, primarily in tourist-related projects. See Enders Declaration, *supra* ¶ 8.

Reestablishment of a vigorous tourism industry could provide Cuba with a significant source of hard currency it could use to further its foreign policy goals. In 1958 Cuba earned $37 million from United States travelers alone, or two percent of its gross national product and almost four percent of foreign exchange earnings (Enders Declaration, *supra* ¶ 10). United States government estimates indicated that if Cuba could return tourism to its 1958 prominence as a source of foreign exchange, within a few years it would earn a net hard currency income of approximately $190 to $225 million per year, which would amount to 20% of Cuba's annual hard currency income under present conditions (Walker Declaration, *supra* ¶ 4).

[16] In July 1982, 31 C.F.R. 515.560 was further amended to clarify the scope of the general and specific licenses and the meaning of certain terms. 47 Fed. Reg. 32060 (1982).

4. a. In June 1982, respondents, who are individuals and groups interested in travel to Cuba, filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Massachusetts.[17] Respondents claimed that the restrictions on travel-related financial transactions imposed by the May 1982 amendment to 31 C.F.R. 515.560 violated 22 U.S.C. (Supp. V) 211a, which prohibits area restrictions on passports except in certain circumstances; exceeded the authority conferred by Section 5(b) of the TWEA and by IEEPA; had not been promulgated pursuant to IEEPA procedures; and violated respondents' First Amendment and due process rights, including their right to travel.

Respondents' request for preliminary injunctive relief was referred to a magistrate. Following briefing and argument, the magistrate recommended denial of a preliminary injunction (App. F, *infra*, 24a-44a). He concluded that in enacting the grandfather clause in Pub. L. No. 95-223, Congress did not intend to freeze in place the specific regulations that happened to be in effect on July 1, 1977 (App. F, *infra*, 36a). Because transactions related to Cuban travel were being regulated on that date (albeit by a regulation authorizing most such transactions by general license), the magistrate concluded that the President had the authority in 1982 to change the extent of that regulation (*ibid.*). The magistrate found that the legislative history supported this construction of the grandfather clause and that the Executive, which was charged with enforcing the TWEA, had construed the clause in a similar manner (*id.* at 36a-39a). Finally, he concluded that an injunction against enforcement of the regulation would cause irreparable injury to the government's conduct of its foreign affairs and that that injury outweighed any inconvenience to respondents re-

[17]One respondent, the Center for Cuban Studies, applied to the Office of Foreign Assets Control of the Department of the Treasury for a license to engage in travel-related financial transactions. That application was denied. See C.A.J.A. 38. Although the other respondents did not apply for licenses, it does not appear from their allegations below that they would qualify either under the general license or for a specific license under the terms of 31 C.F.R. 515.560.

sulting from postponement of their planned travel (*id.* at 40a-42a).

On July 22, 1982, after considering written and oral objections to the magistrate's report, the district court denied the motion for a preliminary injunction (App. E, *infra*, 22a-23a). The district court concluded that respondents were not likely to succeed on the merits of either their statutory or their constitutional claims.[18]

b. The court of appeals vacated the district court's order and remanded with instructions to issue a preliminary injunction against enforcement of 31 C.F.R. 515.560 (App. A, *infra*, 1a-14a). The court of appeals concluded that the grandfather clause did not authorize the 1982 amendment to the regulation, that the government had failed to follow the IEEPA procedures in amending the regulation, and that the amended regulation is therefore invalid. The court declined to reach respondents' other statutory and constitutional contentions.

In concluding that the grandfather clause did not authorize the 1982 amendment to 31 C.F.R. 515.560, the court of appeals relied on its finding that on July 1, 1977, the Treasury Department was "*not* restricting *travel* to Cuba" (App. A, *infra*, 4a). The court recognized that on that date the government was restricting commodity purchases involving Cuba, but concluded that restriction of travel-related transactions was a "very different 'exercise[ ]' of authority" (*id.* at 5a), had been treated differently from commercial restrictions in the past (*id.* at 5a-7a), and, unlike commercial regulations, raised special constitutional concerns (*id.* at 7a).

The court of appeals cited various passages from the legislative history to support its conclusion that Congress intended the grandfather clause to be narrowly construed (App. A, *infra*, 7a-10a). It found further support for its reading of the statute in this Court's directives to lower

[18]During the course of the district court proceedings, respondent Francis E. Bradley obtained a temporary restraining order permitting him to travel to Cuba pending a hearing on the motion for preliminary injunction. See App. G, *infra*, 45a.

courts to construe narrowly all delegated powers that curtail the right to travel (*id.* at 11a-12a). The court concluded finally that its construction of the grandfather clause would not prevent the President from regulating travel-related financial transactions, since it could use the IEEPA procedures to do so (*id.* at 12a), and that a narrow construction of the grandfather clause would be consistent with Congress's overall intent to "impos[e] Congressional limits upon the President's restrictive powers" (*id.* at 12a-13a).

The court of appeals denied the government's petition for rehearing and suggestion for rehearing en banc, as well as its request for stay of the mandate (Apps. B and C, *infra*, 15a-20a). On July 6, 1983, this Court granted a stay of the court of appeals' mandate pending the timely filing and disposition of a petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The court of appeals has invalidated an important component of the Cuban Assets Control Program. Under that program, the Executive employs TWEA authority to regulate financial and property transactions with Cuba as one element in the management of our delicate and difficult relations with the Cuban Government. The court of appeals has held that that authority cannot be used to restrict travel-related transactions involving Cuba. Its holding is based on a wooden and cramped construction of the governing statute, one that will impair the conduct of United States foreign policy and that is inconsistent with congressional intent. The decision below therefore warrants review by this Court.[19]

1. The United States' wide-ranging Cuban embargo, which subjects transactions involving Cuba to government supervision and regulation and which operates, where necessary, to deny Cuba hard currency, is a fundamental element of United States foreign policy.[20] The decision of the

[19]Although the court of appeals remanded for issuance of a preliminary injunction, its opinion on the merits makes clear that it believed issuance of a permanent injunction would be warranted as well. Thus, the case is ripe for review by this Court at this stage.

[20]Michel Declaration, *supra* ¶ 3.

court of appeals, which declares invalid the Executive's adjustment of that embargo with respect to one subject—transactions related to tourist and business travel—gives Cuba the opportunity to earn substantial sums of hard currency that it can use to advance activities inimical to the interests of the United States.[21] More important, the court of appeals' decision casts doubt on other significant post-1977 changes in both the Cuban Assets Control Program and other critical foreign assets control programs still operating under TWEA authority (including embargoes against North Korea, Vietnam, and Cambodia (Kampuchea)).[22] The Section 5(b) authorities on which the Treasury Department relied in amending the regulation at issue in this case are the same authorities used to effect a variety of adjustments to the Cuban embargo and the other foreign assets control programs. Thus, the decision below could be invoked in support of efforts to strike down a host of other important post-1977 amendments to these programs.[23] This is not an idle concern. The Eleventh Circuit recently relied on the decision below as a basis for holding invalid 31 C.F.R. 515.415(a), a regulation that was promulgated during the Mariel boatlift (or "freedom flotilla") of Cuban refugees and that makes clear that 31 C.F.R. 515.201, the general prohibition on transactions with Cuba, covers the transportation to the United States of Cuban nationals without visas. *United States* v. *Frade*, 709 F.2d 1387, 1397-1401 (1983), petition for rehearing filed Sept. 2, 1983. If left unreviewed, the decision below could interfere

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[21] As we indicated in our Application for Stay (at 15-16), the Treasury Department is aware of several instances in which tour groups have announced plans for trips to Cuba following the decision below. See Declaration of John M. Walker, Jr. ¶ 3 and Tabs A and B (Attachment D to Application for Stay). In addition, the decision below will encourage Cuba to move quickly to develop its tourism industry. Michel Declaration, *supra* ¶ 7; Enders Declaration, *supra* ¶ 15.

[22] As of July 1, 1977, the United States was maintaining comprehensive trade embargoes against Cuba, North Korea, Vietnam, and Cambodia (Kampuchea) under the authority of Section 5(b) of the TWEA.

[23] See pages 20-21, note 33, *infra*, for a description of post-July 1977 amendments to the Cuban Assets Control Regulations.

significantly with the government's ability to enforce any post-1977 change in regulations promulgated under grandfathered TWEA authority.[24]

The decision below substantially limits the President's foreign policy options with respect to Cuba and the other countries that continue to be the subject of regulation under Section 5(b) of the TWEA. It casts doubt on the Executive's ability to exercise TWEA authorities with respect to Cuba, North Korea, Vietnam, and Cambodia (Kampuchea) in a manner that is flexible and sensitive to the needs of the diplomatic situation at any particular time. In the past Cuba had to consider the Executive's unquestioned ability to respond to Cuban misconduct swiftly and flexibly through the use of TWEA authorities.[25] But today the President cannot be sure that adjustments to the terms of an ongoing embargo will be upheld by the courts. Ultimately the effect of the decision below is to deprive the President of a "flexible and long-standing foreign policy instrument" (Michel Declaration, *supra* ¶ 10).

The court of appeals indicated rather casually (App. A, *infra*, 12a) that the regulation it invalidated in this case could be repromulgated pursuant to IEEPA. But action under IEEPA requires the President to declare a new national emergency based on a finding that Cuba presents an "unusual and extraordinary threat" to the "national security, foreign policy or economy" of the United States. Such a step could have grave foreign policy implications. Michel Declaration, *supra*, ¶ 9. Declaring a national emergency and finding an "unusual and extraordinary threat" may be

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[24]Since the decision below was issued, various individuals and organizations have notified the Treasury Department of their belief that they are no longer bound by certain provisions of the Cuban Assets Control Regulations. See Walker Declaration, *supra* ¶¶ 4, 6-7, and Tab C; Michel Declaration, *supra* ¶ 7.

[25]Michel Declaration, *supra* ¶¶ 3, 5 (ability of the President to act under TWEA has been "a fact of independent foreign policy significance" and a "central source of leverage the United States has over Cuba"). Cuba may well perceive that the entire Cuban Assets Control Program has been placed in jeopardy, which could affect its response to foreign policy initiatives by the United States. Michel Declaration, *supra* ¶¶ 7, 8, 10.

appropriate as a basis for initial implementation of an assets control program (see page 22, *infra*); but the President may well conclude that these steps could needlessly heighten tensions and adversely affect United States foreign policy interests if used in connection with a mere modification of an existing program. Moreover, use of IEEPA in connection with adjustments to grandfathered embargoes would impose additional procedural burdens on the Executive's conduct of foreign policy and would initiate a two-track system of regulation in connection with the pre-1977 embargoes. Further, if the President were now to act under IEEPA, this would presumably render moot any challenge to what we believe to be an erroneous reading of the grandfather clause. It seems to us inappropriate to force the President to choose between acting under IEEPA (and incurring these grave consequences), on the one hand, and inaction (that is, forgoing adjustments to a grandfathered embargo he otherwise would make), on the other, in the absence of a definitive ruling by this Court that Congress intended to impose such a choice.

2. The decision below is erroneous. The court of appeals gave the grandfather clause an exceedingly narrow construction by reading it to preserve only the precise prohibitions that happened to be in place on July 1, 1977. That construction is inconsistent with the language of the governing statute, with the traditional flexibility granted to the Executive in conducting foreign assets control programs, and with the legislative history that casts light on Congress' purpose in preserving the exercise of certain existing authorities through the grandfather clause.

a. The starting point in construing a statute is the language of the statute itself. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The grandfather clause provides that "the authorities conferred upon the President by section 5(b) of the [TWEA], which were being exercised with respect to a country on July 1, 1977, * * * may continue to be exercised with respect to such country * * *." Pub. L. No. 95-223, Section 101(b), 91 Stat. 1625.

The authorities "being exercised" with respect to Cuba

on July 1, 1977, plainly encompassed the *authority* to impose restrictions on travel-related transactions. On that date, the Cuban Assets Control Regulations prohibited—as they had since 1963—"except as specifically authorized by the Secretary of the Treasury * * * transactions involv[ing] property in which [Cuba] has * * * any interest of any nature whatsoever direct or indirect * * * by any person subject to the jurisdiction of the United States * * *." 31 C.F.R. 515.201(b); 28 Fed. Reg. 6975 (1963). That prohibition was an exercise of the Executive's broad Section 5(b) authority, *inter alia*, to "regulate * * * prevent or prohibit" property transactions with foreign governments and foreign nationals. Its effect was to impose a comprehensive regulatory system—an all-encompassing embargo—on trade and property transactions between the United States and Cuba. The broad prohibition of Section 515.201 encompasses all sorts of commercial and financial transactions with Cuba or Cuban nationals (*e.g.*, payment for Cuban cigars or sugar), including travel-related transactions (*e.g.*, payment for Cuban hotel rooms), and has been so interpreted and applied since 1963.[26] Since the authority to control such transactions was "being exercised" on July 1, 1977, by virtue of Section 515.201, it was encompassed within the Section 5(b) authorities grandfathered under Section 101(b) of Pub. L. No. 95-223.

It is true that in March 1977 restrictions on travel-related financial transactions were eased. But the tempo-

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[26]See the broad definitions of "property," "interest in property," and "transfer" contained in the regulations. 31 C.F.R. 515.310, 515.311. And see page 7, note 13, *supra*. Since 1963, the Department of the Treasury has interpreted Section 515.201 to include a prohibition on travel-related financial transactions. The Department has sought to enforce the prohibition by investigating persons known to have traveled to Cuba, by sending questionnaires to United States businesses with foreign subsidiaries conducting licensed trade with Cuba, and by sending letters to various travel magazines, travel agencies, airlines and individuals warning them of the controls and license requirements. See *United States-Cuba Trade Promotion: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess. 44-46 (1976) (statement of Stanley Sommerfield, Acting Director, Office of Foreign Assets Control, Dep't of the Treasury).

rary loosening of those restrictions—through a regulation granting a general license to engage in certain travel-related transactions—itself constituted an *exercise* of the Executive's Section 5(b) authority, "by means of * * * licenses, or otherwise," to regulate *all* property transactions with Cuba. That authority has been *continuously* asserted from 1963 to 1983, in the form of the general prohibition (in Section 515.201 of the regulations) of all unlicensed property transactions. The 1977 general license in effect granted a temporary permission, needed to overcome the general prohibition—temporary because expressly and at all times subject to amendment, modification, or revocation (see 31 C.F.R. 515.805 (1977)).[27] (In fact, the permission was itself subject to exceptions even in the 1977-1982 period.[28]) Then, in 1982, the permission was in turn narrowed to apply only to transactions connected with travel for purposes of newsgathering, research, family visits, etc. In sum, the authority broadly to regulate *all* property transactions involving Cuba and Cuban nationals—including the purchase of Cuban hotel rooms as well as the purchase of Cuban sugar—has been continuously exercised ever since 1963, was in fact being exercised on July 1, 1977, and has continued to be exercised ever since.[29]

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[27]As this Court has noted, significant conditions can be imposed in connection with expressly revocable licenses. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 673, 674 n.6 (1981) (President had authority to withdraw general license permitting legal actions against Iran, even to the extent of nullifying court orders of attachment issued while such license was in effect). See also *Orvis* v. *Brownell*, 345 U.S. 183 (1953).

[28]Under 31 C.F.R. 515.560 (a)(3) (1977), travelers were authorized to bring back no more than $100 from Cuba (for personal use only). Under 31 C.F.R. 515.560(a)(5) (1977), only transactions involving nonscheduled flights and voyages to, from, and within Cuba were authorized. 31 C.F.R. 515.560(a)(7) (1977) expressly excluded domestic credit card issuers from contracts with Cuban enterprises for extension of credit to travelers.

[29]The legislative history indicates that Congress understood that authority with respect to travel-related financial transactions was being exercised at the time the grandfather clause was being considered. For example, when Leonard Santos, an Administration representative, was asked to list the authorities being exercised with respect to Cuba and Vietnam, he replied that they "would involve the travel to those

The court of appeals' narrow and rigid reading of the grandfather clause disaggregates the authorities being exercised under it into arbitrary compartments in a manner that is wholly inconsistent with the flexibility needed for an effective diplomatic strategy. In the court's view, since many travel-related financial transactions were authorized under the general license established by Section 515.560 of the regulations as of July 1, 1977, the grandfather clause does not permit retightening of the restrictions through modification of the general license. But the grandfather clause does *not* say that only the specific prohibitions on the books on July 1, 1977, may remain in effect; instead, it speaks broadly about preserving the "authorities conferred upon the President by section 5(b)." Section 5(b) itself does not include any specific reference to travel-related financial transactions, but instead gives the President broad power to regulate, prohibit or permit a wide variety of transactions in various circumstances.

There is no indication whatever in the language or structure of these statutes that Congress believed that authority to regulate the purchase of Cuban hotel rooms, restaurant meals, and airline tickets constituted a separate and independent category of authority, to be isolated from the President's authority to regulate other purchases and property transactions. Congress could easily have said, had it wished to do so, that only "existing regulations" or "existing prohibitions" may remain in effect. But it did not do so. It preserved the "authorities * * * being exercised" on July 1, 1977. Since the authority to regulate all property transactions with Cuba was plainly being exercised on that date, it is that authority that was preserved by the grandfather clause.

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countries and the exchange of goods." *Emergency Controls on International Economic Transactions: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 215 (1977) ("*House Subcommittee Hearings*"). Santos also informed the subcommittee that "all the powers conferred are exercised and that there are no additional powers that could be exercised that are not already exercised." *Id.* at 188.

b. The court of appeals also failed to recognize the traditional manner in which foreign assets control programs have been conducted and thus disregarded an important part of the context in which Congress acted in grandfathering TWEA authority. Congress' primary purpose in enacting the grandfather clause was to leave undisturbed on-going embargo programs. See pages 23-24, *infra*. As this Court has recognized, the success of those programs requires broad authority and flexibility in administration, so that they can be adjusted to the diplomatic situation as it changes. See *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 672; *Propper* v. *Clark*, 337 U.S. 472, 493 (1949).[30] The court of appeals' interpretation of the grandfather clause makes it a rigid and unworkable instrument, keyed to the happenstance of that situation as it stood at one moment in 1977.

Experience shows that United States policy with respect to transactions involving property of a foreign country subject to an assets control or embargo program cannot be frozen into place; these programs operate as on-going systems that are components of an on-going foreign policy and that should not be visualized as a static list of specific prohibitions. See, *e.g.*, *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 662-666; *Nielsen* v. *Secretary of the Treasury*, 424 F.2d 833, 839-841 (D.C. Cir. 1970).[31] Thus, between its 1963 in-

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[30]This Court has indicated that both the legislative history of the TWEA and the cases interpreting it "fully sustain the broad authority of the Executive when acting under this congressional grant of power." *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 672. The purpose of the TWEA is to permit the Executive to exercise full control over any property or transaction in which a foreign government or national has an interest. *Propper* v. *Clark*, *supra*, 337 U.S. at 493. See also *Zittman* v. *McGrath*, 341 U.S. 446, 448, 463-464 (1951); *Lyon* v. *Singer*, 339 U.S. 841 (1950). Thus, the TWEA authorities granted by Congress have been construed broadly to preserve the Executive's flexibility. *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952); *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-489 (1947); *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106, 110 (2d Cir.), cert. denied, 385 U.S. 898 (1966).

[31]Experience with the Iranian assets control program illustrates the sorts of adjustments that may be necessary. After Iranian assets were

ception and July 1, 1977, the Cuban Assets Control Program had itself undergone considerable change.[32] Congress can be presumed to have been aware of this history of regulatory adjustment (see *Haig* v. *Agee*, 453 U.S. 280, 300 (1981); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978)); and there is no indication that it intended to eliminate the flexibility that obviously was necessary to the continuing effectiveness of existing programs. The Executive has understood Congress' intent in these terms, and, as might be expected, the foreign assets control programs that existed on July 1, 1977, have continued to evolve since that date.[33] Indeed, the 1982 retightening of restrictions on travel-related financial transactions, following the 1977 liberaliza-

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blocked, a general license authorized attachments of such property. That license was subsequently revoked, and the attachments obtained under the license rendered invalid. See *Dames & Moore* v. *Regan*, *supra*.

[32]For example, the embargo on trade with Cuba was initiated in 1962 under the narrow authority of the Foreign Assistance Act of 1961, 22 U.S.C. 2370(a). Following the 1963 Cuban missile crisis, the President tightened the embargo by exercising TWEA authority to regulate imports from third countries of goods manufactured from Cuban raw materials and trade between Cuba and Americans or American-owned subsidiaries in foreign countries. 28 Fed. Reg. 6975 (1963). In 1964, the regulations were amended to provide for the taking of a census of Cuban blocked assets in the United States (31 C.F.R. 515.607, 515.608; 29 Fed. Reg. 1617, 1619). In 1974, the regulations were amended to clarify the prohibition preventing United States persons from dealing abroad in Cuban-origin merchandise (31 C.F.R. 515.410) and to provide, *inter alia*, for issuance of specific licenses for importation of goods taken out of Cuba prior to July 8, 1963 (31 C.F.R. 515.543), for Cuban-origin goods sent as gifts (31 C.F.R. 515.544), for Cuban-origin books, films, tapes, news materials, and research samples (31 C.F.R. 515.545, 515.546, 515.547), and for payments to Cuba for overflights and emergency landings (31 C.F.R. 515.548). See 39 Fed. Reg. 25317, 25318, 25319, 28434 (1974). In 1975, the regulations were amended to provide for licenses for certain categories of transactions between Cuba and United States-owned or controlled firms in third countries (31 C.F.R. 515.559; 40 Fed. Reg. 47108).

[33]In addition to the regulation under challenge in this case, there have been a number of post-July 1977 changes to the Cuban Assets Control Regulations. In 1978, the regulations were amended to authorize quarterly remittances to Cuba of funds from non-blocked accounts

tion (which occurred only a few months before July 1, 1977), is characteristic of the sort of adjustment necessary to keep an assets control program consistent with our nation's foreign policy needs.[34]

The programs authorized by the TWEA are intimately connected to the national security and the conduct of foreign policy. The grandfather clause, preserving authorities under the TWEA, should be construed consistently with the strong tradition recognizing the Executive's inherent authority and need for flexibility in this area. See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *Curran* v. *Laird*, 420 F.2d 122, 128-133 (D.C. Cir. 1969); cf. *E.W. Bliss Co.* v. *United States*, 248 U.S. 37, 46 (1918). Indeed, because the grandfather clause implicates the Executive's responsibility under the Constitution to conduct foreign affairs, the courts "Should hesitate long before limiting or embarrassing such powers." *MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915). In the absence of convincing evidence to

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for family support purposes, to authorize travel-related transactions of Cuban nationals with United States visas, and to allow United States travel agents or sponsors of exhibitions or performances to arrange or assist in such travel transactions, and to authorize transactions in connection with public exhibitions or performances in the United States by visiting Cuban nationals (31 C.F.R. 515.563, 515.564, 515.565; 43 Fed. Reg. 19852). In 1979, a new regulation imposed an interest payment requirement on holders of certain types of blocked Cuban property (31 C.F.R. 515.205; 44 Fed. Reg. 11770). In 1980, the regulations were amended to add a provision clarifying the application of the regulations to the Mariel boatlift (31 C.F.R. 515.415) and provisions authorizing transactions incidental to satellite communications for purposes of news coverage and authorizing licenses on a case-by-case basis for transactions incidental to other communications activities, such as the provision of telephone and telegraph services between the United States and Cuba (31 C.F.R. 515.542; 45 Fed. Reg. 58843).

[34]It will not do to suggest that the grandfather clause permits relaxation of restrictions on transactions, but does not allow tightening of an embargo without the declaration of a new national emergency. The broad TWEA authorities that are preserved under the grandfather clause should not operate on a one-way ratchet. If Congress intended to give the President the flexibility to relax the embargo in the interests of United States foreign policy, it must also have intended that he be able to impose restrictions if he determines that such a step would further United States foreign policy interests.

the contrary, it is appropriate to conclude that Congress did not intend to deprive the Executive of the flexibility to make necessary adjustments to the Cuban Assets Control Program.

The court below suggested that, if the President wished to make changes in assets control programs existing on July 1, 1977, Congress intended that he use the new IEEPA procedures. See App. A, *infra*, 12a. But there is no indication that Congress wished to create a two-track system, under which some regulations involving Cuba (*e.g.*, those addressed to importing Cuban cigars or sugar) would exist under grandfathered TWEA authority, while others (*e.g.*, those addressed to buying Cuban hotel space) would be covered by new IEEPA authority. Such a construction of the statute would require the President, when he wished to tighten an existing embargo, to take the major step of declaring a new national emergency with respect to an "unusual and extraordinary threat * * * to the national security, foreign policy, or economy of the United States". Requiring such a formidable and sensitive step to be taken in connection with an adjustment to an existing program makes little sense and would limit significantly the President's flexibility in conducting foreign policy.[35] Indeed, as

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[35]See Michel Declaration, *supra* ¶ 9 (noting that invocation of IEEPA procedures would have significant foreign policy implications).

The scheme Congress established under IEEPA itself suggests that the court of appeals erred in construing the grandfather clause. Under IEEPA, the President must declare a national emergency with respect to a particular threat at the *outset* of a foreign assets control program. However, once the President has taken that major step, that declaration then serves as the predicate for an ongoing system of regulation, so that the Executive may issue and amend regulations with respect to the same threat without declaring a new national emergency. Rather than requiring a declaration of emergency in connection with the grandfathered TWEA authority, Congress settled for an annual declaration that exercise of such authorities with respect to a specific country was in the national interest. In view of the latter requirement, there is little reason to believe Congress also would have required declaration of a new national emergency in connection with modification of regulations issued under TWEA authority, particularly when it did not require such a declaration in connection with similar changes in IEEPA regulations.

we now show, it was Congress' desire to avoid this very result that led it to enact the grandfather clause.

c. The legislative history of the grandfather clause, read as a whole, indicates that Congress intended to preserve the Executive's flexibility with respect to regulation of transactions involving those countries for which an embargo was in effect on July 1, 1977. The Senate Report makes clear the breadth of the authority reserved to the President under the grandfather clause: "Section 101(b) would enable the President to continue to *control transactions* with certain countries (Cuba and Vietnam, for example) * * *." S. Rep. No. 95-466, 95th Cong., 1st Sess. 4 (1977) (emphasis added). The House Report recognizes that the comprehensive Cuban embargo itself was an "exercise" or "use" of Section 5(b) authorities that was in effect on July 1, 1977, and that it therefore would be preserved under the grandfather clause. H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 9, 12 (1977). Many of those who spoke during congressional consideration of the grandfather clause indicated that they understood that it was the existing embargoes against particular countries that were being grandfathered. For example, during the House debates, Representative Bingham (chairman of the subcommittee responsible for the legislation) explained:

> [T]his legislation specifically grandfathers the embargoes against Vietnam, Cambodia, Laos, Cuba, and other existing embargoes, so that they are not affected in any way by this legislation.

123 Cong. Rec. 38166 (1977).[36] On signing the legislation, President Carter likewise made the point that it would not affect "embargoes now being exercised against certain countries." 13 Weekly Comp. Pres. Doc. 1940, 1941 (Dec. 28, 1977).

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[36] See also, *e.g.*, *House Subcommittee Hearings*, *supra*, at 188, 193, 207, 210; *Markup on Revision of Trading With the Enemy Act*, *supra*, at 2, 7; S. Rep. No. 95-466, *supra*, at 4; 123 Cong. Reg. 22475 (1977) (statement of Representative Bingham, referring to continuation in effect, at the President's discretion, of "trade embargoes and asset control programs currently applied by the United States under the authority of section 5(b)").

The debate in Congress did not focus on the substance of specific regulations in effect on July 1, 1977, as it presumably would have if Congress had intended to freeze those regulations in place. Rather, debate focused on whether existing embargoes should be terminated or allowed to continue. Congress recognized that it would be inappropriate for the President to have to declare a new national emergency in connection with an existing embargo. As the court below noted (App. A, *infra*, 10a), the legislators were sensitive to the Executive's negotiating needs:

> To have required the President to announce publicly a *new declaration* of emergency in order to continue an *existing embargo* would have required him to undertake a political act with international political impact. The result, as described by Prof. Lowenfeld before the subcommittee, might have been an "inappropriate interference in negotiations being carried out by the Executive Branch * * *." [*House Subcommittee Hearings*,] *supra*, at 19.

See also, *e.g.*, *House Subcommittee Hearings*, *supra*, at 207 (statement of Rep. Bingham) (noting that the subcommittee had recognized that it "might be embarrassing for the President to have to declare new national emergencies with respect to Cuba and Vietnam"); *id.* at 209 (statement of R. Roger Majak, subcommittee staff director) ("The prospect of the President having to declare a new emergency with respect to some of these existing uses, such as Cuba, * * * does pose a diplomatic, or potential diplomatic problem"); *id.* at 190 (statement of Rep. Bingham) ("I personally would not argue that we would ask or expect the President to declare, for the first time, an emergency with respect to Cuba."); *id.* at 103 (testimony of Assistant Secretary of the Treasury C. Fred Bergsten); *id.* at 182 (testimony of Leonard Santos). Ultimately, Congress enacted the grandfather clause because it recognized that continuation of existing uses of Section 5(b) authorities was "important for the continued day-to-day functioning of the Government" (H.R. Rep. No. 95-459, *supra*, at 6-7) and that the legislation should avoid getting into the merits of ex-

isting embargo programs. See, *e.g.*, *House Subcommittee Hearings*, *supra*, at 210 (remarks of Rep. Bingham).

In support of its narrow construction of the grandfather clause the court of appeals relied on isolated and, at best, ambiguous statements by some legislators. In particular, the court considered references in the legislative history to "existing uses" of TWEA authorities as indicating a desire to grandfather only the specific prohibitions in effect on July 1, 1977. See App. A, *infra*, 7a-9a. But the court pointed to nothing in the legislative history that defines the "existing uses," and, in view of other portions of the legislative history, that phrase is more appropriately read to refer to the existing embargoes against specific countries, as the House and Senate reports suggest.[37] Indeed, the court itself acknowledged that it could "understand how others could reasonably conclude that the legislative history is ambiguous and should be read differently" from the manner in which the court had construed it (App. B, *infra*, 19a). We submit that in fact the legislative history points to the conclusion that Congress wished to avoid requiring the President to declare a new national emergency in connection with an existing embargo and that it did not intend to cut back on the President's flexibility to make adjustments of the type at issue in this case.

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[37]The court of appeals also relied on the deletion from the proposed grandfather clause of language stating that "any other authority conferred upon the President by [Section 5(b)] may be exercised to deal with the same set of circumstances" and Representative Bingham's statements about that deletion. See App. A, *infra*, 9a-10a. The deletion may have resulted from a concern that the language could have been used to extend embargoes to countries that were not then subject to a comprehensive embargo. See *House Subcommittee Hearings*, *supra*, at 211-212. The Administration was not concerned about the deletion because it was of the view that where there was already an embargo "all the powers conferred are exercised and that there are no additional powers that could be exercised that are not already exercised." *House Subcommittee Hearings*, *supra*, at 188 (remarks of Leonard Santos). Indeed, Representative Bingham himself confirmed this understanding when, subsequent to his statements about the deleted language, he noted with respect to the embargo against Cuba that "[i]t is not the intention in this draft to interfere with that." *Id.* at 188. See also *id.* at 207.

d. The court of appeals supported its restrictive construction of the grandfather clause in part by reference to this Court's statements about the constitutional protection afforded to travel and to 22 U.S.C. (Supp. V) 211a, under which Congress limited the Secretary of State's authority to impose area restrictions on United States passports. We believe the court of appeals' analysis in this respect was faulty.

The challenged regulation does not limit the right to travel as such; it regulates only transactions involving transfer of money or other economic benefits to Cuba, such as payment for a hotel room or an airline ticket. The purpose of the regulation is not to prevent travel but to deny hard currency to Cuba and to head off Cuban plans to develop a lucrative tourism industry that would generate hard currency that in turn could be used for purposes detrimental to the interests of the United States. See pages 8-9, *supra*. The regulation is part of a broad program under which many different sorts of transactions that would result in economic benefit to Cuba are prohibited unless authorized by the Secretary of the Treasury. Moreover, the challenged regulation does not have the effect of cutting off all travel to Cuba; rather, it affects primarily transactions incident to tourist and business travel. Under the regulation, journalists, professional researchers, close family members, those whose travel expenses are paid for entirely by Cuba, artists and athletes, and various other categories of individuals are permitted to engage in travel-related transactions pursuant to general or specific licenses.

To the extent the challenged regulation limits the exercise of a constitutional right to travel, that limitation is restricted to a single country and constitutes an incidental and permissible effect of a valid restriction on property transactions based on considerations of national defense and foreign relations. See, *e.g.*, *Haig* v. *Agee*, *supra*, 453 U.S. at 306-310; *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980); *Brown* v. *Glines*, 444 U.S. 348, 354-358 (1980); *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968); *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965); *Veterans & Reservists for Peace in Vietnam* v. *Regional Commissioner of*

Customs, 459 F.2d 676 (3d Cir.), cert. denied, 409 U.S. 933 (1972); *Teague* v. *Regional Commissioner of Customs*, 404 F.2d 441 (2d Cir. 1968), cert. denied, 394 U.S. 977 (1969); *American Documentary Films, Inc.* v. *Secretary of the Treasury*, 344 F. Supp. 703, 710 (S.D.N.Y. 1972).[38] Thus, constitutional principles do not require the court of appeals' restrictive reading of the grandfather clause.

The challenged regulation is not inconsistent with 22 U.S.C. (Supp. V) 211a, which was amended in 1978 to limit to certain circumstances the Secretary of State's ability to place area restrictions on the use of United States passports. By its own terms the limitation is inapplicable here, because 31 C.F.R. 515.560 does not restrict the use of passports; instead, it regulates certain travel-related transactions pursuant to TWEA authority. 22 U.S.C. (Supp. V) 211a places no limits on the authority of the Secretary of the Treasury to regulate such transactions under the TWEA. Since TWEA authorities are instrumental in the conduct of United States foreign policy, no such limitation should be implied.

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[38]Although the right of international travel "is a part of the 'liberty' of which the citizen cannot be deprived without due process of law" (*Kent* v. *Dulles*, 357 U.S. 116, 125 (1958)), it is not a fundamental right, such as the right of interstate travel. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170, 176-177 (1978); *Califano* v. *Torres*, 435 U.S. 1, 4 n.6 (1978). Moreover, this case concerns only the more limited interest in traveling freely to a particular foreign country—an interest subject to reasonable regulation and restriction, based on national security and foreign policy considerations. See *Haig* v. *Agee*, *supra*, 453 U.S. at 306; *Zemel* v. *Rusk*, *supra*, 381 U.S. at 14-15. See also *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159-160 (1963).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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SEPTEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1695

RUTH WALD, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

DONALD REGAN, ET AL.,
DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOSEPH L. TAURO, *U.S. District Judge*]

Before

BOWNES and BREYER, *Circuit Judges*,
and PETTINE,* *Senior District Judge*.

May 16, 1983

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*Of the District of Rhode Island, sitting by designation.

BREYER, *Circuit Judge*. Appellants are American citizens who want to travel to Cuba. They cannot do so because of a Treasury Department regulation that prohibits them (and many other American travelers) from paying for "transportation-related" expenses "ordinarily incident to travel to and from Cuba" and for any other expenses "ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there." 31 C.F.R. § 515.560 (1982). Appellants attacked the lawfulness of this regulation on constitutional and statutory grounds and asked the district court for a preliminary injunction against its enforcement. The court refused to issue the injunction and this appeal followed.

We need not reach the appellants' constitutional argument, for we believe that the challenged regulation lacks statutory authority. The Treasury Department, in promulgating the regulation, concededly did not follow the "consultative" procedures mandated by the 1977 International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706—procedures aimed at focusing the attention of Congress as well as the President on the need for the restrictions of the sort at issue here. Rather, the Department relied for its authority on a "nonconsultative" predecessor statute—§ 5(b) of the Trading with the Enemy Act of 1917, (TWEA), 50 U.S.C. App. § 5(b)—the relevant part of which had been *repealed* by the time it promulgated this regulation. The Department argues that a "savings clause" in the new law, Pub. L. No. 95-223, § 101(b), 91 Stat. 1625, 1625 (1977), allows it to rely on the old law, and thereby validates its regulation. Our review of the language and legislative history of the "savings clause," however, convinces us that this is not so. Rather, the old law does not apply and the new law's procedures were not followed. The regulation thus lacks statutory authorization, and the district court improperly denied the appellants' motion for a preliminary injunction.

I

Between 1917 when the Trading with the Enemy Act was enacted and 1977 when it was modified, TWEA provided statutory authority for the President to restrict,

without congressional approval, financial transactions with foreign nations during both times of war and times of "national emergency." *See, e.g.*, Exec. Order No. 11940, 41 Fed. Reg. 43707 (1976) (export controls); Exec. Order No. 11810, 39 Fed. Reg. 35567 (1974) (same); Exec. Order No. 11796, 39 Fed. Reg. 27891 (1974) (same); Exec. Order No. 11677, 37 Fed. Reg. 15483 (1972) (same); Exec. Order No. 11387, 33 Fed. Reg. 47 (1968) (balance of payments program); Proclamation No. 2038, 48 Stat. 1689 (1933) (bank holiday); Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 Harv. L. Rev. 1102, 1104, 1114 n.61 (1983) [hereinafter cited as Harv. Note]. In 1977, however, Congress and the President modified the statute in order to narrow the President's power to impose these restrictions without first consulting with Congress. Congress did so by passing IEEPA and amending TWEA. These statutes now limit the President's power to impose economic restrictions in two ways. First, they separate his authority to regulate during war from his authority to regulate during a "national emergency." Second, they permit him to invoke the provisions of the statutes to deal with an "unusual and extraordinary threat" not involving a state of war only if he declares "a national emergency with respect to such threat," 50 U.S.C. § 1701(a), reports to Congress on the emergency every six months, 50 U.S.C. § 1703(b) & (c), and allows Congress to vote by concurrent resolution on the validity of his declaration of emergency, 50 U.S.C. §§1621(a), 1622(a).

The government concedes that, in promulgating the regulations here at issue nearly five years after the TWEA amendments and IEEPA became law, it did not follow the new procedures. The President did not declare a "national emergency," transmit appropriate reports to Congress, or grant Congress the opportunity to "veto" his actions through a resolution. The government, however, relies upon a "savings clause" in the amendment to TWEA which states:

> [T]he authorities conferred upon the President by [the old version of] section 5(b) of the Trading With the En-

> emy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country....

91 Stat. at 1625. The government argues that, because TWEA "authorities ... were being exercised" with respect to Cuba "on July 1, 1977," this language makes the old law still applicable; and the new IEEPA "consultative" requirements therefore do not apply.

In fact, on July 1, 1977—the relevant "savings clause" date—the government was *not* restricting *travel* to Cuba. Although the Treasury Department regulated travel to Cuba by means of regulations of the sort here at issue from 1963 to early 1977, on March 29, 1977, the Department repealed those travel restrictions and issued a broad, general license allowing all persons traveling to Cuba to pay for their transportation and living expenses. 42 Fed. Reg. 16621 (1977); *see also* 42 Fed. Reg. 25499 (1977) (further liberalization). The State Department, which had restricted travel to Cuba through passport regulations under 22 U.S.C. § 211a, eliminated those regulations during the same month. *See Emergency Controls on International Economic Transactions: Hearings before the Subcommittee on International Economic Policy & Trade of the House Committee on International Relations*, 95th Cong., 1st Sess. 15 n.7 (1977) [hereinafter cited as *Emergency Controls Hearings*] (statement of Prof. Andreas F. Lowenfeld, N.Y. Univ.). Hence, from March 1977 until May 1982, travel to Cuba was fully allowed. It is difficult to see, looking at the words of the statute alone, how the government can claim that the Treasury's "authorit[y]" to restrict travel-related financial transactions was "being exercised with respect to" Cuba "on July 1, 1977." Thus, it is difficult to see how the language of the "savings clause" exempts the Treasury Department from IEPPA [sic] and "saves" its power to promulgate these regulations without consulting Congress.

The government's response, and its most important argument, is that the words "authorities ... being exercised" in

the savings clause were meant to have a very broad meaning. In the government's view, as long as *some* TWEA authority was being exercised with respect to a country, say Cuba, on July 1, 1977, the clause saves the power to exercise *every* TWEA authority or at least every authority of the same broad type (*e.g.*, exchange control authority). Thus, if Treasury had imposed controls, for example, on the purchase of Cuban machinery, sugar, or cigars on July 1, 1977, the clause would "save" its power to impose controls on the payment of travel expenses to Cuba as well. Although this is not what the clause *says*, we have nonetheless investigated the new Act's legislative history and related administrative practice to see if there is support for the government's position. We have found none.

First, as a matter of common sense and common English, restricting, say, commodity purchases and restricting travel purchases would seem to be very different "exercises" of authority—different enough at least not to count as the exercise of the same authority. The direct effects of such restrictions are likely to differ. Most TWEA commercial restrictions seem designed simply to keep money or valuable commodities out of the hands of an unfriendly power. But Cuban travel restrictions may have only a small monetary impact, while effectively eliminating "tourist and business travel to that country." Treasury Dept. Press Release (submitted to this court).

Moreover, administrative practice suggests that the government, historically speaking, has always considered travel restrictions different from other, more typical TWEA rules and regulations. The Justice Department and the State Department for many years after the enactment of the TWEA did not even consider TWEA an important source of "travel restriction" powers. The Justice Department consistently told Congress that the President did *not have* the power to control travel by Americans to and from the United States. *See Control of Travel from and into the United States*, H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3 (1918); *Annual Report of the Attorney General of the United States* 39-40 (1918); *Annual Report of the Attorney General of the United States* 16 (1917); *Hearings Regarding*

H.R. 16742: Restraints on Travel to Hostile Areas, Hearings before the House Committee on Internal Security. 92d Cong., 2d Sess. 7539, 7561 (1972) (statement of Asst. Attorney General A. William Olson) ("there is no statute with which a person can be effectively prevented from traveling to an unauthorized area") [hereinater [sic] cited as *Restraints on Travel Hearings*]. *See also Restraints on Travel to Countries or Areas Engaged in Armed Conflict with the United States*, H.R. Rep. No. 248, 93d Cong., 1st Sess. 1 (1973). The State Department, at least before the mid-1960's, despite the existence of TWEA's criminal sanctions, "consistently [took] the position that there was no statute which imposed or authorized" criminal penalties for violations of passport restrictions. *United States* v. *Laub*, 385 U.S. 475, 485 (1967); *see Restraints on Travel Hearings*, *supra*, at 7572-81 (testimony of Robert Johnson, Deputy Director, Passport Office, Department of State). As far as we can tell, the Department of Justice, over a course of decades, brought only one or two TWEA-based travel prosecutions, and those were subsequently abandoned. The Treasury Department, in recent years, has considered TWEA an adequate source of travel restriction authority. However, documents submitted to this court indicate that Treasury still treats travel restrictions as different from other restrictions. When it imposes, administers, or enforces its travel restrictions, Treasury consults more closely with the State Department and defers more completely to State's expertise than in the case of ordinary commercial restrictions. *Accord United States-Cuba Trade Promotion: Hearing before the Subcommittee on International Trade & Commerce of the House Committee on International Relations*, 94th Cong., 2d Sess. 7 (1976) (testimony of Kirby Jones, Alamar Associates, Inc.); *id.* at 44-45 (testimony of Stanley L. Somerfield, Acting Director, Office of Foreign Assets Control, Treasury Department). Moreover, at least from 1958 to 1975, Congress continually considered and reconsidered whether it *should* enact a statute imposing criminal penalties for violations of passport *travel* restrictions. Note, *Area Restrictions And The Right to Travel Abroad*, 8 U.Cal. Davis. L. Rev. 401, 426 n.130 (1975).

These facts suggest that Congress, and the State, Justice, and Treasury Departments would not consider travel restrictions to be run-of-the-mill commercial restrictions, and would not consider the authority to impose travel restrictions to be similar to the authority to restrict commercial purchases.

Finally, unlike most commercial regulations, travel restrictions raise special constitutional issues, for they involve specially protected rights of citizens. *See Shapiro* v. *Thompson*, 394 U.S. 618, 629 (1969); *United States* v. *Laub*, 385 U.S. at 481; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 517 (1964); *Kent* v. *Dulles*, 357 U.S. 116, 126 (1958). This, too, supports what common sense suggests—namely that an "exercise" of the authority to restrict travel is different enough from, say, an exercise of the authority to prevent the public from buying Cuban cigars, that the two should not be lumped together for purposes of deciding what "authorities" Treasury was "exercising" on July 1, 1977.

Second, the legislative history makes clear that Congress intended the savings clause to be narrowly interpreted to allow the President to continue in effect only those restrictions actually exercised in July 1977. It did not want the existence of one sort of TWEA restriction in 1977 to serve as a justification for imposing a new one. In fact, it did not want the President to be able to use the old Act as statutory authority for anything new. If one reads through the history of the 1977 changes, the narrow scope of what Congress intended to "save" becomes clear.

For one thing, throughout the committee hearings and the House and Senate reports, nearly every time a legislator referred to the "savings clause" and to the exercise of the TWEA "authorities," he spoke of specific, existing "*uses*" of those authorities. For example, Congressman Cavanaugh asked the Carter Administration's principal spokesman for the amendments, Mr. Bergsten of the Treasury Department:

> MR. CAVANAUGH.... First of all, Mr. Bergsten, would it be your understanding that [the savings clause] would strictly limit and restrict the grandfa-

> thering of powers currently being exercised under 5(b) [of the TWEA] to those specific uses of the authorities granted in 5(b) being employed as of June 1, 1977.
>
> MR. BERGSTEN. Yes, sir.
>
> MR. CAVANAUGH. And it would preclude the expansion by the President of the authorities that might be included in 5(b) but are not being employed as of June 1, 1977.
>
> MR. BERGSTEN. That is right.

Revision of Trading with the Enemy Act: Markup before the House Committee on International Relations, 95th Cong., 1st Sess. 21 (1977) [hereinafter cited as *Markup*]; *see also Emergency Controls Hearings*, *supra*, at 147-48 (statement of R. Roger Majak, Staff Director of Subcommittee on International Economic Policy & Trade) ("There is a clear need to grandfather or deal in some special way with existing uses of section 5(b) authorities"); *id.* at 168 (statement of Rep. Cavanaugh) ("where the powers of 5(b) are currently operative"); *id.* at 182 (statement of Rep. Cavanaugh) ("ongoing uses of 5(b)"); *id.* at 189 (statement of Rep. Bingham) ("it was the purpose of [the "savings clause"] to grandfather in existing uses of 5(b)"); *Markup*, *supra*, at 9 (statement of Rep. Bingham) ("So the subcommittee settled on a limited grandfather of existing uses of international economic emergency authorities."); *Trading with the Enemy Act Reform Legislation*, H.R. Rep. No. 459, 95th Cong., 1st Sess. 11 (1977) ("exercises of emergency powers under section 5(b) which are currently in progress should be generally exempted").

Like the legislators, administration spokesmen for the bill discussed the "savings clause" in terms of existing uses of the Act's authorities. The Treasury Department also sent Mr. Leonard E. Santos to the committee hearings, who testified that the bill "grandfathered in existing uses" of § 5(b). *Emergency Controls Hearings*, *supra*, at 152; *see also id.* at 181-82 (testimony of Leonard E. Santos) (previous testimony "very clearly indicated that existing uses would be grandfathered"). Furthermore, Mr. Santos believed that "[o]nce this bill becomes law, section 5(b) will no longer provide authority in times of national emergency. So

if the President seeks to take new national emergency action, he would have to take it under this new bill [the IEEPA]." *Id.* at 211. The Treasury needed a "savings clause," he explained, because it would find it awkward to issue a new declaration of emergency to justify "existing uses" of § 5(b) authority. *Id.* at 182; *see also id.* (testimony of Leonard E. Santos) (the testimony "of both Treasury and the State Department [which did not mention travel to Cuba] listed specifically those uses of 5(b) that we would like grandfathered"); *id.* at 113 (testimony of Asst. Treasury Secretary C. Fred Bergsten). The State Department's spokesmen gave testimony that was broadly consistent with that of Mr. Bergsten and Mr. Santos. Assistant State Department Secretary Julius L. Katz, for example, urged "that the section 5(b) powers and authorities . . . now in effect" be saved. *Id.* at 101. Although very specific exercises of existing authority were discussed, *see, e.g., id.* at 108, neither the Treasury nor the State Department mentioned a word about the need to preserve through the "savings clause" the right to impose Cuban travel restrictions.

For another thing, when Congressman Bingham, a principal legislative sponsor of the TWEA amendments, discovered draft language that might have allowed a broader reading of the "savings clause," thereby preserving TWEA powers that were *not* then exercised, he deliberately struck the language from the bill. The subcommittee staff's initial draft of the "savings clause" not only preserved "any authority conferred upon the President by section 5(b) of the Trading with the Enemy Act, which is being exercised with respect to a set of circumstances on the date of enactment of this Act," but also stated that "any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances." *Amendments to the Trading with the Enemy Act: Subcommittee Working Draft of June 8, 1977*, 95th Cong., 1st Sess. § 101(b). Subcommittee Staff Director Majak explained that under the second provision, "with respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those particular authorities that he is now using, but any others which are conferred by

section 5(b).... I think it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the particular authorities themselves and their usage." *Emergency Controls Hearings, supra*, at 167. Congressman Bingham objected to this draft, making clear that he did not want to grandfather the former—the "situation." Rather, he wanted to grandfather only the latter, namely the particular existing uses of those powers. He said, "I don't know why it should be necessary to give [the President] authority to expand what has already been done," *id.* He therefore opposed the second clause. And, the subcommittee eventually dropped it from the bill.

Finally, an examination of the purpose behind the "savings clause" supports the apellants, not the government. Congress provided the "savings clause" for existing trade embargoes to mitigate the adverse effect that automatic repeal would have had on the President's negotiating position with respect to other countries. To have required the President to announce publicly a *new declaration* of emergency in order to continue an *existing embargo* would have required him to undertake a political act with international political impact. The result, as described by Prof. Lowenfeld before the subcommittee, might have been an "inappropriate interference in negotiations being carried out by the Executive Branch...." *Emergency Controls Hearings, supra*, at 19. It would be "very awkward," Professor Lowenfeld explained, for Congress suddenly to call an "end" to the Cuban embargo "without any deal or understanding." *Id.; see also id.* (testimony of Prof. Lowenfeld) ("perhaps ... [the Cuban embargo] should not be terminated without a quid pro quo"). Assistant Treasury Secretary Bergsten repeated this theme, stating that "a unilateral termination of the embargoes" that would require the President to reassert a national emergency "would severely undermine the U.S. negotiating position with those countries, and our worldwide posture." *Id.* at 103. Cuban travel restrictions did not involve the problem at which this clause was aimed, however, for the very reason that they were

not in effect in 1977. Thus, their reimposition in 1982 automatically required a public declaration with political impact *anyway*. For example, when they were reimposed Assistant Treasury Secretary John M. Walker declared the restrictions "an important part of this Government's policy of tightening the current trade and financial embargo against Cuba." "Cuba will not be allowed," he warned, "to earn hard currency from American tourists at a time when Cuba is actively sponsoring armed violence against our friends and allies. ..." Crossette, *U.S., Linking Cuba to 'Violence,' Blocks Tourist and Business Trips*, N.Y. Times, Apr. 20, 1982, at A1, col. 4. Thus, the reason for the "savings clause"—the need to avoid this type of public act in order to continue *ongoing* restrictions—simply bears no relation to this case. In light of the consequent lack of justification for a "savings clause" to preserve powers not then being exercised, it is not suprising that a reading of the history of IEEPA and the TWEA amendments suggests, even more strongly than a few quotations can indicate, that Congress intended IEEPA, not the old TWEA, to apply to particular restrictions, such as Cuban travel, not in effect in July 1977.

II

We conclude that, given ordinary principles of statutory construction, *see, e.g., Drysdale* v. *Spirito*, 689 F.2d 252, 256-57 (1st Cir. 1982); *Constance* v. *Secretary of HHS*, 672 F.2d 990, 995-97 (1st Cir. 1982), the "savings clause" does not apply. We are reinforced in our conclusion by several factors that suggest that even if the statute (and its history) were more ambiguous, we should nonetheless interpret it to favor appellants.

First of all, this case involves travel which the Supreme Court has held to be "a constitutional right closely related to" those activities that the Bill of Rights protects from infringement by Congress. *Aptheker* v. *Secretary of State*, 378 U.S. at 517; *see Shapiro* v. *Thompson*, 394 U.S. at 629; *United States* v. *Laub*, 385 U.S. at 481; *Kent* v. *Dulles*, 357 U.S. at 126; Note, *Constitutional Protection of Foreign Travel*, 81 Colum. L. Rev. 902, 906 (1981). Although

courts often defer to the Executive in the area of foreign affairs, *see, e.g., Dames & Moore* v. *Regan*, 453 U.S. 654, 672-73, 678 (1981); *Zemel* .v. *Rusk*, 381 U.S. 1, 17 (1965); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 314-22 (1936), the Supreme Court has explicitly instructed us to "construe narrowly all delegated powers that curtail or dilute" the right to travel. *Kent* v. *Dulles*, 357 U.S. at 129; *see Aptheker* v. *Secretary of State*, 378 U.S. at 508. That principle of narrow interpretation applies here.

Moreover, the savings clause, as we interpret it, does not prevent the other two branches of government from taking whatever steps they believe necessary to conduct our affairs with Cuba. It simply requires the President in conducting those affairs to consult with the legislative branch according to the terms of IEEPA. The TWEA amendments and IEEPA move travel restrictions of this sort from the first of the categories mentioned by Justice Jackson in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (areas in which Congress has delegated its authority to the President) to the third category, *id.* at 637-38 (areas in which Congress has taken measures inconsistent with the President's claim to power). In situations involving the third category, "[c]ourts can sustain exclusive presidential control ... only by disabling the Congress from acting upon the subject." *Id.* In effect, we do not *limit* the exercise of foreign affairs powers by the other branches, so much as we *allocate* the powers of decision-making *between* the other two branches according to the guidelines Congress set forth. We do not arrogate to ourselves the power to make foreign policy, so much as we preserve the constitutional "equilibrium," *id.* at 638, between the President and Congress and insist that the Executive Branch follow the laws that the Legislative Branch enacts.

Finally, the Supreme Court has also suggested that we look to other contemporaneously enacted statutes for the light they cast on the historical context of the statute at issue. *See Dames & Moore* v. *Regan*, 453 U.S. at 678. Were we to do so here, we should find additional grounds for interpreting the TWEA savings clause restrictively. The

1977 legislative changes at issue were only part of a series of laws aimed at imposing Congressional limits upon the President's restrictive powers. *See, e.g.*, War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548) (restrictions on Presidential power to employ U.S. forces abroad); National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651) (procedures for Presidential declarations and continuations of national emergencies). In 1978 Congress amended the Passport Act, 22 U.S.C. § 211a, to prohibit the executive branch from imposing peacetime passport travel restrictions without the authorization of Congress except for health and safety considerations. Pub. L. No. 95-426, § 124, 92 Stat. 963, 971 (1978); *see Haig* v. *Agee*, 453 U.S. 280, 290 n.18 (1981). At the time, the Senate Foreign Relations Committee stated in its Report that it believed "that the freedom-of-travel principle is sufficiently important that it should be a matter of law not dependent upon a particular Administration's policy." *Foreign Relations Authorizations Act, Fiscal Year 1979: Report of the Senate Committee on Foreign Relations*, S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978). To interpret the "savings clause" as the government suggests, would make the Passport Act amendment meaningless in terms of Cuba, for the Executive Branch could unilaterally impose Cuban travel restrictions by imposing currency restrictions as it did here. A more narrow interpretation of the TWEA savings clause—by making applicable IEEPA's consultative procedures—helps to harmonize the two statutes. Thus, these additional considerations and interpretive principles help support our conclusion. As Part I indicates, they are not in fact necessary to reach it.

III

To grant a preliminary injunction, a court must consider whether plaintiffs will suffer irreparable injury if the injunction is denied, whether such injury outweighs any harm that the injunctive relief would cause the defendants, whether plaintiffs have a likelihood of succeeding on the

merits, and whether the public interest would not be harmed by a preliminary injunction. *Agency Rent-A-Car, Inc.* v. *Connolly*, 686 F.2d 1029, 1034 (1st Cir. 1982); *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981). The district court here denied the plaintiffs' motion on the grounds that they had not demonstrated a sufficient likelihood of succeeding on the merits. We disagree. For the reasons stated above in part I, we believe that the "savings clause" of the amendment to TWEA does not authorize the executive to issue the regulation at bar. For the reasons stated in part II, we believe that even if the legislative history of the "saving clause" were not so clear, we would still have to find it inadequate support for the government's attempt to restrict travel to Cuba without consulting Congress. Thus, we hold the challenged restrictions on travel illegal. And, in light of the definitiveness with which the law can be stated, plaintiffs need not make a separate showing of irreparable harm, *see, e.g., United States* v. *Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2948, at 461 (1973), or of the balance of injuries, *see, e.g., Central Presbyterian Church* v. *Black Liberation Front*, 303 F. Supp. 894, 901 (E.D. Mo. 1969); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 103 F. Supp. 569, 576 (D.C.D.C.), *aff'd*, 343 U.S. 579 (1952), and the public has no interest in the enforcement of an illegal regulation. Accordingly, a preliminary injunction should issue against the enforcement of the April 20, 1982 amendments to 31 C.F.R. § 515.560, 47 Fed. Reg. 17030.

The order of the district court is vacated, and the case is remanded with instructions to issue a preliminary injunction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1695

RUTH WALD, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

DONALD REGAN, ET AL.,
DEFENDANTS, APPELLEES

Before BOWNES, and BREYER, *Circuit Judges*,
and PETTINE,* *Senior District Judge*

MEMORANDUM AND ORDER

Entered: June 16, 1983

The government moves for rehearing and it seeks a stay of this court's mandate. We deny these motions. Because the government states that the decision has significant implications for foreign policy, detailed discussion of the government's requests and reasons is appropriate.

I

The Petition for Rehearing

We do not believe that the arguments the government advances provide an adequate basis for a rehearing. First, contrary to the government's current suggestion, the government had adequate opportunity to brief and to argue the question upon which the court's decision turned, namely, whether travel is sufficiently like "say, commodity purchases ... to count as the exercise of the same authority"

*Of the District of Rhode Island, sitting by designation.

for savings clause purposes. (Slip op. at 7.) The government's initial brief argued at length that the savings clause should be interpreted to embargo an existing state of emergency rather than an existing set of regulations on a given subject. Oral argument refined the question further; and, the government filed a post-argument brief in response to the court's question:

> What reason is there to believe that administrators have treated "travel" as a distinct and separate category of economic transaction under the statutes?

The government stated in its post-argument brief that it would seek permission to file a further brief if there was more it wished to say. It did not do so. It seems to us that the government had a fair opportunity to address the issues; that the issues were adequately focused; and that the issues were adequately briefed by both sides.

Second, the government argues that it *was* exercising its authority to restrict travel to Cuba on July 1, 1977, because of the *form* of its regulations—because its regulations consisted of a general rule forbidding *all* transactions with Cuba, *see* 31 C.F.R. § 515.201, followed by a "General License" allowing "[a]ll transactions ordinarily incident to travel to and from [and in] Cuba," *see* 42 Fed. Reg. 16621 (Mar. 29, 1977), *codified at* 31 C.F.R. § 515.560(a). The court treated this argument as invalid because it assumed that *substance* (*i.e.*, was travel in fact being regulated?) rather than *form*, controlled. The government devoted little attention in its initial brief to this argument, and nothing it says there or in its new brief convinces us that the court's assumption was faulty.

Third, the government now argues that *in fact* it was regulating Cuban travel on July 1, 1977, because travelers could bring back only $100 worth of goods for personal use, because it allowed only non-scheduled flights, and because domestic credit card issuers were forbidden to contract with Cuban enterprises. These restrictions, in our view, merely represent an effort to reconcile rules that allow travel with rules that forbid ordinary commercial transactions. Regardless, their impact on "travel" is too minor to change the result.

Fourth, the government points to two statements in the legislative history of the savings clause which it believes support its position. *See Emergency Controls on International Economic Transactions: Hearings Before the Subcommittee on International Economic Policy & Trade of the House Committee on International Relations*, 95th Cong., 1st Sess. 211 (1977) (Statement of Treasury Department spokesman: "If the President claims that he must do something new with respect to Cuba, . . . that, of course, is automatic."); *id.* at 215 (Statement of Treasury Department spokesman to the effect that currently there "are essentially transaction control regulations to the extent that the transaction involves a transfer of assets, it would involve travel to those countries [*i.e.*, Cuba and Vietnam] and the exchange of goods.") In fact, the extent to which these statements help the government is unclear. When the spokesman used the word "automatic" did he mean that new regulations would automatically take effect without the IEEPA procedures, or did he mean (in context) that it was obvious the new procedures must be used? When he referred to restrictions in effect on travel to Cuba (a few weeks after they had been removed), was he focusing on the issue considered here, or was he simply comparing a (later changed) draft of the grandfather clause that *plainly accepted* the government's view of the savings clause with another (here irrelevant) grandfather clause designed to save certain asset control powers? Regardless, the overall impression that the legislative history gives remains the same. And, the two quotations do not warrant significant change in the court's conclusions. We shall, however, modify the opinion to make clear that the government believes these quotations support its position.

Fifth, the government argues that the court's decision will affect foreign policy adversely by requiring the Executive Branch to follow IEEPA procedures whenever it wishes to tighten present restrictions. We point out that the court's opinion concerns travel, which it considered a separate category of restriction; it does not concern minor modifications of existing rules. The question of whether it is desirable for the President to declare an emergency and

to consult with Congress when imposing restrictions on (previously unrestricted) travel would seem to be a matter for the Executive and Legislative branches, not this court.

II

The Petition for a Stay of Mandate

The court issued its decision in this case on May 16, 1983. Under Fed. R. App. P. 41(a) the court's mandate would have issued at the close of business on June 6, 1983, had the government not filed a rehearing petition. Since it did so, the mandate, in the ordinary course of events, would issue seven days after entry of an order denying the petition. The government seeks, in this event, an additional stay of our mandate for thirty days while it decides whether or not to seek certiorari.

Although the government seems to ask for a short period of additional time, more is at stake. Under Fed. R. App. P. 41(b), if we grant this additional stay and if the government then files a petition for certiorari, "the stay shall continue until final disposition by the Supreme Court." Fed. R. App. P. 41(b). Thus, what is at issue is whether, during the several months probably necessary for the disposition of the government's certiorari petition, the appellants will be free to travel to Cuba.

In deciding whether or not to grant this application, we have considered several factors. Ordinarily, where a party has won on appeal after losing in the district court, it is appropriate to put the appellate court decision into effect pending the Supreme Court's ruling. The winning *appellate* court party has the better claim to the law's support. It is therefore the practice in this circuit and in the Supreme Court, *cf.* Sup. Ct. R. 44.4, not to grant stays except in unusual cases. On the other hand, in this instance the losing party points to considerations of foreign policy allegedly threatened by the court's decision. That factor weighs in favor of the stay. Nonetheless, appellants are asserting the right to travel, "a constitutional liberty closely related to" those activities that the Bill of Rights protects from infringement by Congress. *Aptheker* v. *Secretary of State*,

378 U.S. 500, 517 (1964). This factor weighs against the stay.

Finally, we have made a judgment about the likelihood of the Supreme Court reaching a different result. We can understand how others could reasonably conclude that the legislative history is ambiguous and should be read differently. The Supreme Court, however, has instructed us to "construe narrowly all delegated powers that curtail or dilute" the right to travel. *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958). And, we doubt that a reasonable reader could conclude that the relevant legislative history *clearly* supports the government. Thus, we think it unlikely that the Supreme Court will reach a different decision.

After considering the various harms likely to be caused by a stay, the rights of the parties, the practical implications of the decision, and the likelihood of the government's success in further proceedings, we conclude that the government's request for an additional stay should be denied.

ORDER

The opinion shall be modified as follows:

On page 13, lines 16 through 18, delete the words:

> neither the Treasury nor the State Department mentioned a word about the need to preserve through the "savings clause" the right to impose Cuban travel restrictions.

Substitute therefor the words:

> the Treasury and the State Departments mentioned scarcely a word about the need to preserve through the "savings clause" the right to impose Cuban travel restrictions. *But cf. id.* at 215 (testimony of Leonard E. Santos).

The application for rehearing and the application for stay of mandate are denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1695

RUTH WALD, ET AL.,
PLAINTIFFS, APPELLANTS

v.

DONALD REGAN, ET AL.,
DEFENDANTS, APPELLEES

Before CAMPBELL, *Chief Judge*,
COFFIN, BOWNES and BREYER, *Circuit Judges*
and PETTINE,* *Senior District Judge*

ORDER OF COURT

Entered: June 16, 1983

Upon consideration of "Petition for Rehearing and Suggestion for Rehearing En Banc," which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having voted against rehearing en banc,

It is ordered that said application for hearing en banc is denied.

By the Court
FRANCIS P. SCIGLIANO
Clerk.

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*Of the District of Rhode Island, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-1695

RUTH WALD, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

DONALD REGAN, ET AL.,
DEFENDANTS, APPELLEES

JUDGMENT

Entered May 16, 1983

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court of July 22, 1982, denying plaintiffs' motion for a preliminary injunction is vacated and the cause is remanded to that court with instructions to issue a preliminary injunction consistent with the opinion filed this day.

By the Court:
FRANCIS P. SCIGLIANO
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.
82-1690-T

RUTH WALD, ET AL., PLAINTIFFS

AND

PUERTO RICAN OLYMPIC COMMITTEE, ET AL.,
INTERVENING PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

Order

July 22, 1982

TAURO, D.J.

On July 16, 1982, after hearing, Magistrate Collings issued a Report and Recommendation that the court deny plaintiffs' motion for a preliminary injunction. Subsequently, the intervening plaintiffs filed a second motion for a temporary restraining order,[1] which was the subject of a hearing before the court on July 21, 1982. Plaintiffs' objections to the Magistrate's report were filed with this court on July 19, 1982, and July 22, 1982.

Plaintiffs' claims raise issues concerning the meaning of applicable federal statutes and regulations, in the context of relevant legislative history, Supreme Court decisions and factual circumstances extant during critical periods of policy determination. Having considered the arguments that the parties presented in their submissions and at the July 21st hearing, and without making specific rulings on

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[1] Judge Mazzone, sitting as the Judge assigned to the Miscellaneous Business Docket, issued a temporary restraining order, now expired, which did not apply to these intervenors. Judge Skinner denied without prejudice an earlier motion by the intervenors for a temporary restraining order.

all aspects of the Magistrate's report and plaintiffs' objections thereto, the court finds that plaintiffs have failed to show that their claims based upon the applicable statutory law and inferences as to Congressional intent are likely to succeed on the merits.

Plaintiffs' additional claims raise fundamental constitutional issues that might well be proven at trial to be meritorious. Nevertheless, despite the fine arguments of counsel, the Court determines that plaintiffs have not to date demonstrated, in light of relevant Supreme Court decisions,[2] that such claims have a substantial likelihood of success on the merits.

Accordingly, the Court hereby DENIES the intervenors' motion for a temporary restraining order.

Further, the Court approves that part of the Magistrate's Report consistent with the Court's findings, *supra*, overrules related objections filed by the plaintiffs, and ORDERS that plaintiffs' motion for a preliminary injunction be DENIED.

IT IS SO ORDERED.

/S/ JOSEPH L. TAURO

United States District Judge

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[2] *See, e.g., Haig* v. *Agee*, 453 U.S. 280 (1981); *Aptheker* v. *Secretary of State*, 378 U.S. 506 (1964); *Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Kent* v. *Dulles*, 357 U.S. 116 (1958).

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1690-T

RUTH WALD, MARIAN LOWE, ROSARIO MORALES, FRANCIS E. BRADLEY, REV. ALICE HAGEMAN, CUBA RESOURCES GROUP, ROBERT C. HOWARD, CENTER FOR CUBAN STUDIES, LINDA TURNER, PLAINTIFFS,

v.

DONALD REGAN, SECRETARY OF THE TREASURY, JOHN M. WALKER, JR., ASSISTANT SECRETARY OF THE TREASURY, DENNIS M. O'CONNELL, DIRECTOR, OFFICE OF FOREIGN ASSETS CONTROL, GEORGE SHULTZ, SECRETARY OF STATE, AND RONALD WILSON REAGAN, PRESIDENT OF THE UNITED STATES, DEFENDANTS,

PUERTO RICO OLYMPIC COMMITTEE AND RAFAEL MORALES CUBANES, ON HIS OWN BEHALF AND BEHALF OF THE ASOCIACION DE TURISTAS OLIMPICOS DE PUERTO RICO (ATOPRICO), AND OTHER PUERTO RICO SPORTS FANS, INTERVENING PLAINTIFFS.

REPORT AND RECOMMENDATION ON MOTIONS FOR PRELIMINARY INJUNCTION

COLLINGS, U.S.M.

The Complaint in this case was filed on June 17, 1982. Filed at the same time was a Motion For A Preliminary Injunction (#03). The matter was referred to a United States Magistrate on June 23, 1982 for a Report and Recommendation on this motion as well as a Motion for a Temporary Restraining Order (#06) filed by the plaintiff Francis E. Bradley on June 23, 1982.

The case came on for initial hearing on June 25, 1982 before me. At that time, both sides objected to my hearing the Motion For Temporary Restraining Order. As a result, I issued a Report Re: Motion For Temporary Restraining Order and Order Scheduling Hearing On Motion For Preliminary Injunction (#08) in which I referred the Motion For A Temporary Restraining Order to the U.S. District Judge assigned to the Miscellaneous Business Docket and set the hearing before me on the Motion For A Preliminary Injunction for July 1, 1982 at 2:00 P.M.

On June 25, 1982, Judge Mazzone, sitting as the Judge assigned to the Miscellaneous Business Docket, allowed the Motion For A Temporary Restraining Order.

On the morning of July 1, 1982, the Puerto Rico Olympic Committee and Rafael Morales Cabranes, on his own behalf and on behalf of the Asociacion De Turistas Olimpicos De Puerto Rico (ATOPRICO), and other Puerto Rico sports fans filed a Petition For Intervention (#10), a Verified Intervening Complaint (#11), and a Motion For Preliminary Injunction And Temporary Restraining Order (#12). At the hearing at 2:00 P.M. on July 1, 1982, after the defendants objected to my hearing the Intervening Plaintiffs Motion For A Temporary Restraining Order, I issued a Report Re: Motion For Temporary Restraining Order (#13) in which I referred the Intervening Plaintiff's Motion For A Temporary Restraining Order to the Judge assigned to the Miscellaneous Business Docket.

On July 1, 1982, Judge Skinner, sitting as the Judge assigned to the Miscellaneous Business Docket, allowed the Petition For Intervention, denied the motion for a temporary restraining order without prejudice, and ordered that the motion for a preliminary injunction consolidated with the plaintiff's motion for preliminary injunction at a hearing before me.

Thereafter, on July 1, 1982, I heard arguments from the plaintiffs, the defendants, and the intervening plaintiffs.

THE FACTS

The facts are not in any substantial dispute. In capsule form, it can be said that this case arises out of a change in Federal Regulations promulgated on April 20, 1982 (effective May 15, 1982). On that date, the Office of Foreign Assets Control of the Department of the Treasury amended Section 515.560 of the Cuban Assets Control Regulations (Title 31, C.F.R., Sec. 515.201 *et. seq.*) so as to limit travel to Cuba for specified purposes, including official travel, visits to close relatives, and travel connected with research, newsgathering, or similar activities. Travel-related transactions relating to ordinary tourist or business travel, permitted since 1977, were no longer permitted unless the person desiring to travel to Cuba received a specific license from the Treasury which could be granted in appropriate cases for humanitarian reasons or for purposes of public performance in Cuba, as in connection with cultural or sports activities. *See Federal Register*, Vol. 47, No. 76 at 10730 (April 20, 1982). This amendment to the regulations had as its stated purpose "... to reduce Cuba's hard currency earnings from travel by U.S. persons to and within Cuba." *Id.*

According to the Complaint, the plaintiffs are either persons who wish to travel to Cuba themselves but do not qualify for a specific license or groups who sponsor travel to Cuba by persons who do not qualify for a specific license. They allege that the new regulations prohibit them from travelling to Cuba or sponsoring trips to Cuba after May 15, 1982 where such activity was lawful prior thereto.

Specifically, Ruth Wald seeks to travel to Cuba on or about August 15, 1982 for ten days to meet and make contact with Cuban women; Marion Lowe seeks to travel to Cuba at the same time stating that she is "... curious about the country [and is] ... particularly interested in learning how the role of women has changed in Cuba since 1969"; Rosario Morales seeks to visit Cuba this summer to visit friends; Francis E. Bradley, Assistant Headmaster of George School, Newton, Pennsylvania seeks to lead a trip of students to Cuba this summer to learn about "a different

culture and social system"; Rev. Alice Hageman seeks to visit Cuba for two weeks in August 1982 as a guest of the Women's Department of the Cuban Ecumenical Council; the Cuba Resources Group seeks to organize tours to Cuba by American citizens; Robert C. Howard seeks to travel to Cuba in December, 1982 with his children and several friends; the Center for Cuba Resources seeks to arrange study tours in Cuba and has projected tours to Cuba during the September-December, 1982 period in the areas of literature, music, film, economics, and politics; and, lastly, Linda Turner seeks to visit Cuba "this winter" in order to learn about the Jewish community there. (*See* attachments to Notice Of Motion For Preliminary Injunction, #03).

With respect to the Intervening Plaintiffs, the Puerto Rico Olympic Committee is a non-profit corporation. Rafael Morales-Cabranes is President of the Asociation de Turistas Olimpicos de Puerto Rico (ATOPRICO), also a non-profit corporation, whose sole purpose is to travel with and support Puerto Rican athletes at the Olympic Games, the Pan-American Games, and the Central American and Caribbean Games. In or about mid-1981, the Organizing Committee of the XIV Central American and Caribbean Games (CASCO) selected Havana, Cuba as the site for the games in August, 1982. Shortly after the decision was made to hold the games in Havana, the President of the Puerto Rico Olympica Committee made arrangements for the Cuban government to provide accommodations for about 1,000 relatives, friends and fans of competing athletes who would go to Cuba to view the games and support the team. An agreement was reached with the Cuban Government whereby the Puerto Rican sports fan wishing to go could do so for $1200 per person, of which the Puerto Rico Olympic Committee would earn approximately 10-15% to help defray costs. 1,000 sports fans subscribed to go on the trip. All of the arrangements were made before the change in the regulations in April, 1982. After the change in the regulations, an application was made for a specific license in accordance with the regulations, but although a license was granted for the athletes and coaches and some other sup-

port personnel, the license for the 1,000 sports fans was denied.

PLAINTIFFS' ALLEGATIONS

In summary form, the plaintiffs allege that the President and the Secretary of the Treasury acted illegally in promulgating the change to the Cuban Assets Control Regulations on April 20, 1982. Specifically, they contest the power of the executive branch to issue the regulations under Section 5(b) of the Trading With The Enemy Act, 50 U.S.C. App., Sec. 5(b), which is the authority under which the executive presumed to act in promulgating the change. In addition, the plaintiffs allege that the regulations are in violation of Title 22, United States Code, Section 211(a), dealing with the executive's inability to promulgate geographic limitations on travel; are vague; deprive plaintiffs of their First Amendment rights; deprive plaintiffs of their right to travel without due process of law in violation of the Fifth Amendment; are being administered in an arbitrary and discriminatory manner in violation of the due process clause; and deprive plaintiffs of equal protection.

LEGISLATIVE AND REGULATORY HISTORY

The Cuban Assets Control Regulations were promulgated on July 9, 1963 and replaced the Cuban Import Regulations issued on February 6, 1962. The regulations were issued pursuant to the authority granted by Section 5(b)(1) of the Trading With The Enemy Act, 50 U.S.C. App., Section 5(b)(1) which then read as follows:

> During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through or to any banking institution and the importing, exporting, hoarding, melting or earmarking of gold or

silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent, or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States.

Since 1963 was not "during the time of war", the regulations were promulgated on the basis that 1963 was "during ... [a] period of national emergency declared by the President". The "national emergency declared by the President" which was in effect in 1963 was the declaration of national emergency by President Truman on December 16, 1950, which has remained in effect. This delegation, and the President's promulgation of the Cuban Assets Control Regulations pursuant to it, have been upheld by the Courts. *Sardino* v. *Federal Reserve Bank of New York*, 381 F.2d 106 (2 Cir., 1966).

The Cuban Assets Control Regulations, as they existed from 1963 to 1977, did not specifically state that travel to Cuba was prohibited, although the Government takes the position that the regulations inferentially prohibited such travel since any travel would necessarily involve transactions generally prohibited by Title 31, C.F.R., Section 515.201. The Government supports this interpretation by reference to the Written Statement of Professor Andreas Lowenfeld to the *Hearings before the Subcommittee on International Economic Policy and Trade* of the Committee on International Relations, House of Representatives, 95th Congress, 1st Sess., March 29, 1977 at p. 15 and also the Affidavit of Myles R.R. Frechette (para. 6) filed in the instant case on July 1st.

However, it is fair to say that the regulation of travel to and from Cuba during the period 1963 to 1977 was primarily accomplished by the State Department through its administration of the passport laws. *See Zemel* v. *Rusk*, 381

U.S. 1,3,23 (1965); *United States* v. *Laub*, 385 U.S. 475, 478-479 (1967). On January 16, 1961, the Department of State issued Public Notice 179 which stated that: "Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State..." 26 Fed. Reg. 492 cited in *United States* v. *Laub, supra* at 478-9. These Public Notices continued to be issued, the last one being issued on September 16, 1976, which expired of its own terms six months later. *Federal Register*, Vol. 41, No. 184 at 41105, 9/21/76.

Six months later, i.e. March 16, 1977, a new administration was in office and the Public Notice was not renewed. Passports thus became valid for travel to Cuba. The new administration changed its policy with respect to travel to Cuba, and in May of that year, President Carter amended the Cuban Assets Control Regulations, *See Federal Register*, Vol. 42, No. 96 at 25499-500 (5/12/77), so that Title 31, C.F.R., Section 515.560, provided, in pertinent part:

> *Certain transactions incident to travel to and in Cuba.*
>
> (a) The following transactions are authorized:
>
> (1) All transactions ordinarily incident to travel to and from Cuba.
>
> (2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.
>
> * * * *
>
> (4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons to, from or in Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points outside the United States; chartering an aircraft or vessel; arranging hotel accomodations [sic] in Cuba; ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration of authorized services.

* * * *

However, from 1973 to 1976, there was Congressional activity with respect to the basic legislation authorizing the declaration of a national emergency and the use of the authority by the President. In 1973, the Special Committee on the Termination Of National Emergencies in the Senate began a study and investigation of the matter, and at the conclusion of the study, Congress made significant changes in the legislation, legislation which underlies the authority by which the Cuban Assets Control Regulations were promulgated. Specifically, in 1976, the Congress, in the National Emergencies Act, Title 50, U.S.C., Section 1601 *et. seq.*, terminated "all powers and authorities possessed by the President . . . as a result of the existence of any national emergency in effect on September 14, 1976", said termination to be effective two years from September 14, 1976. On December 28, 1977, Congress passed the International Emergency [Economic] Powers Act of 1977, Title 50, U.S.C., Section 1701 *et. seq.*, which eliminated the power to invoke the Trading With The Enemy Act in times of a declared national emergency, leaving the Trading With The Enemy Act applicable only in time of declared war and establishing new procedures to deal with new "national emergencies".

However, as part of the International Emergency [Economic] Powers Act of 1977, Congress added a "grandfather" clause with respect to powers being exercised as of July 1, 1977 as a result of a national emergency which had been declared under the Trading With The Enemy Act prior to September 14, 1976 and which, absent such a clause, would automatically expire two years from September 14, 1976 as a result of the National Emergencies Act, Title 50, U.S.C., Section 1601. This provision, which can be found in the note to Title 50 Appendix, U.S.C., Section 5 reads as follows:

> **Notwithstanding the amendment made by subsection (a) [amending section 5(b)(1) of the Trading With The Enemy Act so as to make it applicable only in times of declared war and not in times of declared national emergencies], the authorities conferred upon the President by section 5(b) of the Trading With the Enemy**

> Act which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by a President before such date may be continued to be exercised with respect to such country, except that unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act [Title 50, U.S.C., Sec. 1601(a)] at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [September 14, 1976]. The President may extend the exercise of such authorities with respect to such country for one-year period upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

Section 101(b) of Public Law 95-233.

There is no question but that the President has lawfully extended "the exercise of such authorities" for one-year periods, the last being an extension by President Reagan which will expire on September 14, 1982 and which provided, in pertinent part:

> Therefore, pursuant to the power conferred upon me by section 101(b) of Public Law 95-223, I extend for one year, until September 14, 1982, the exercise of those authorities with respect to countries affected by:
>
> * * * *
>
> (3) the Cuban Assets Control Regulations, 31 CFR Part 515; . . .

There is further no dispute that it is Section 101(b) of Public Law 95-223 and the extension made pursuant to it which the Government based its power to amend the Cuban Assets Control Regulations, Title 31, C.F.R., Section 515.560 on April 20, 1982 as recited *supra*.

What is in dispute is whether the President had such power in April, 1982 when, as of July 1, 1977, the regulations did not contain the restrictions of travel-related activities to Cuba which were imposed in April, 1982.

THE LAW WITH RESPECT TO THE RIGHT TO TRAVEL

The right to international travel is not protected by the First Amendment to the Constitution, since it is an inhibi-

tion of action, not speech. *Zemel* v. *Rusk*, 381 U.S. 1 at 16-17 (1965). Rather, the right to international travel "... is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Kent* v. *Dulles*, 357 U.S. 116, 125 (1958). *See also United States* v. *Laub*, 385 U.S. 474, 481 (1967). Thus, any infringement of that 'liberty' must be pursuant to the law-making functions of the Congress. *Kent* v. *Dulles*, *supra* at 129. The cases starting with *Kent* v. *Dulles* and ending with *Haig* v. *Agee*, 453 U.S. 280 (1981), albeit dealing with the issue of the executive's power to restrict passports, have all focused on whether Congress, by one means or another, has approved, either explicitly or impliedly, of the executive's action in restricting passports. Thus, in *Zemel* v. *Rusk*, the Court found that the Passport Act of 1926, Title 22, U.S.C., Section 211a (1958 ed.), although not expressly so providing, gave the executive power to place area restrictions on travel because there was "an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved such power." 381 U.S. at 12.

However, in 1978, Congress amended Title 22, U.S.C., Section 211(a) to add the phrase:

> Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

As a result, there now can be no argument that Congress, except in the limited circumstances listed in the statute which are not applicable to the case at bar, now approves of area restrictions on travel by means of restricting passports as not being valid for travel to certain areas; rather, they have specifically stated that the executive does not have that power.

In my view, the amendment to Title 22, U.S.C., Section 211(a) does not invalidate the new regulations promulgated on April 22, 1982 restricting travel to Cuba, because the section only dealt with the power to restrict *passports;* al-

though the April, 1982 regulations have the *effect* of restricting travel to Cuba, the executive has done nothing to "designate" passports as being restricted for travel in Cuba.

Rather, I view both the court decisions and the legislative changes to Title 22, U.S.C., Section 211(a) as more sharply defining what the dispute in this case is—i.e., was the President acting within the power granted to him by Congress in promulgating the changes to the Cuban Asset Control Regulations in April, 1982. For as *Kent* v. *Dulles*, *supra* teaches, and subsequent decisions have reaffirmed, any regulation on travel, a "liberty" protected by the Fifth Amendment, must be done pursuant to the law-making function of the Congress. 381 U.S. at 129.

LIKELIHOOD OF SUCCESS ON THE MERITS

In this Circuit, in order to be entitled to a preliminary injunction, a plaintiffs must demonstrate (1) a probability that they will prevail on the merits and (2) a danger of immediate irreparable harm absent such injunctive relief. *Automatic Radio Manufacturing Co.* v. *Ford Motor Company*, 390 F.2d 113, 115 (1 Cir., 1968). In the instant case, I do not find that the plaintiffs have carried their burden of establishing a probability of success on the merits.

As stated *supra*, the core issue is what powers were conferred by Congress on the President by the so-called "grandfather" clause of Section 101(b) of Public Law 95-223, which is reproduced in full at pp. 11-12, *supra*. What Congress actually wrote in the statute is "...*the authorities* conferred upon the President by Section 5(b) of the Trading With The Enemy Act *which were being exercised with respect to a country on July 1, 1977* as a result of a national emergency declared by a President before such date *may be continued to be exercised with respect to such country...*" (Emphasis supplied). What Congress meant by the underscored phrases is in controversy.

The Government takes the position that the phrases mean that if on June 1, 1977, the President was exercising any authority to regulate transactions with respect to a country pursuant to a declared state of emergency, Con-

gress gave him the full authority to regulate those transactions with respect to that country pursuant to the national emergency, including the authority to impose additional restrictions on transactions which were not in effect on June 1, 1977. Therefore, the argument runs, even though there were few restrictions on travel to Cuba on July 1, 1977 (after President Carter amended Title 31, C.F.R., Section 515.560 on May 12, 1977 to permit such travel), since *some* authority to restrict travel was still being exercised as of July 1, 1977, the President could impose tighter restrictions pursuant to the "grandfather" clause, since he was exercising some authority on July 1, 1977.

The Government puts the argument another way—Title 31, C.F.R., Section 515.201, which has been in effect continuously from 1963 to the present, and thus in effect on July 1, 1977, bans virtually all transactions with Cuba except as "specifically authorized" by the Secretary of the Treasury "by means of. . . .licenses." As of June 1, 1977, in Title 31, C.F.R., Section 515.560, the Secretary of the Treasury had "specifically authorized" "transactions ordinarily incident to travel to and from Cuba" as an exercise of his basic authority in Section 515.201 to do so, but the authority is the authority to regulate—that is to "specifically authorize" or not—and that authority—i.e. the authority to regulate—was being exercised on June 1, 1977. Thus, the President's authority to regulate in a different, i.e. more restrictive manner in 1982, is preserved by the "grandfather" clause.

After a careful review of all the papers filed in this case, as well as the legislative history upon which the plaintiffs rely, I am of the opinion that the government's interpretation has more merit than the interpretation urged by the plaintiffs. I thus find that the plaintiffs have not met their burden of establishing a probability that they will prevail on the merits.

First, that there is precedent for the government's interpretation. In *United States* v. *Fernandez-Pertierra*, 523 F. Supp. 1135 (1981), Judge Kehoe was faced with the validity to amendments which President Carter promulgated to the Cuban Asset Control Regulations on May 19, 1980 in re-

sponse to the so-called "Mariel Boatlift". The amendment, which added Title 31, C.F.R., Section 515.415, had as its purpose to interpret Section 515.201 so as to prohibit transactions in connection with the transportation of certain Cuban nationals to the United States" and "[t]he need for such amendment is to make it clear that all such transactions are prohibited by the regulations." *Federal Register*, Vol. 45, No. 98, May 19, 1980 at p. 32671. Judge Kehoe wrote:

> The amendment [to 5(b) of the Trading With The Enemy Act, Public Law 95-223, December 28, 1977] did, however, allow the President to continue exercising those authorities conferred upon him by Section 5(b) "which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date[.]" Section 101(b) of Pub. L. 95-223, 91 Stat. 1625. By this "grandfather" provision, the President, or his designee, continues to possess the authority to issue regulations pertaining to Cuba. Accordingly, the Cuban Asset Control Regulations, originally promulgated in 1963, and supplemented from time to time since then, continue to have the force and effect of law...

Id. at 1138.

Second, it is my opinion that a close reading of the legislative history, upon which the defendants place their main reliance, indicates that Congress did not intend to freeze the specific regulations in effect on June 1, 1977; rather, what Congress intended was to allow the President to exercise the authorities with respect to Cuba which he was exercising on that date, but did not intend to restrict the particular manner in which the authority was being exercised. With respect to travel, since travel to Cuba was regulated as of June 1, 1977, albeit in the form of allowing most travel, the President in 1982 had the power to change the extent of regulation of travel, that is to regulate the travel in a more restrictive manner.

The defendants make much of the fact that before the Subcommittee on International Economic Policy And Trade, there was a draft bill which read as follows:

(b) Notstanding [sic] the amendment made by subsection (a)—

(1) any authority conferred upon the President by section 5(b) of the Trading with the Enemy Act, which is being exercised with respect to a set of circumstances on the date of enactment of this Act as a result of a national emergency declared by the President before such date of enactment, may continue to be exercised with respect to such set of circumstances; and

(2) any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances.

Congressman Bingham, Chairman of the Subcommittee, raised a question about the subsection (2), stating that:

> It seems to me that if the President has not up to now used some authority that he has under 5(b) in connection with those cases where 5(b) has been applied, I don't know why it should be necessary to expand what has already been done. It is really going beyond grandfathering.
>
> It seems to me that grandfathering applies to what has been done to date, and that should be ample authority. I think on this point we would be particularly anxious to have the administration's reaction.

Hearings Before The Subcommittee On International Economic Policy And Trade of the Committee On International Relations, House of Representatives, 95th Congress, First Session, June 8, 1977 at p. 167.

The Administration responded the next day in the person of Leonard E. Santos, Attorney Adviser, Office Of The General Counsel, Department of the Treasury, who stated that the Administration took the position that "all powers conferred are exercised and that there are no additional powers that could be exercised which are not already exercised." *Id.* at 188. Therefore, there was no need for inclusion of subsection (2) of the draft.

If the power is seen as the power to regulate travel-related transactions to Cuba, the fact that President Carter had, just a month before, exercised his authority to amend the Cuban Assets Control Regulations to permit more trav-

el to Cuba would be evidence that the power or authority to regulate travel to Cuba was already being exercised.

Therefore, I do not find that discussion between Congressman Cavanaugh and C. Fred Bergsten, Assistant Secretary for International Affairs, Department of the Treasury, as being at odds with this interpretation. *See Markup before the Committee On International Relations*, House of Representatives, 95th Congress, First Session, June 16, 1977 at p. 21-22. In responding affirmatively to the Congressman's questions, Mr. Bergsten's position was that the amendment would strictly limit and restrict the grandfathering of powers being exercised to those specific uses of powers being currently being exercised under 5(b) to those specific uses of the authorities granted in 5(b) being employed as of June 1, 1977 and would preclude the expansion by the President of the authorities which might be included in 5(b) but are not being employed as of June 1, 1977. Given the complete legislative history, I do not believe the term "uses of" suggested that the President had to exercise powers in the future in the exact manner he was exercising them on June 1, 1977, especially since it was the administration's position that all the powers conferred were being exercised on June 1, 1977.

I find support for this analysis in descriptions of the "grandfather" clause given in subsequent reports and statements as the amendment made its way through the legislative process after June 16th. For example, in Mr. Bergsten's testimony before the Senate Subcommittee on International Finance of the Committee on Banking, Housing, and Urban Affairs on September 8, 1977, he refers to the bill, which had already passed the House, as authorizing the President "...to continue to exercise Section 5(b) powers *invoked* as of July 1st of this year...". *Hearing before the Subcommittee on International Finance* of the Committee On Banking, Housing, And Urban Affairs, United States Senate, 95th Congress, First Section, p. 2.

Third, it is my view that the fact that President Carter amended the Cuban Assets Control Regulations in May, 1980 to deal with the Mariel boatlift is evidence that the regulations were not frozen as of July 1, 1977 by the

"grandfather" clause. In "interpreting" Section 515.201 (the general prohibition) so as to make clear that certain types of travel-related activities were prohibited by it, the President was exercising a power in a way different from the way it was exercised on June 1, 1977; in my view, the amendment promulgated in April 20, 1982 stands on no different a footing.

Fourth, it must be kept in mind that as a general proposition, "The interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute." *Zemel* v. *Rusk*, 381 U.S. at 11.

Lastly, the defendant claims that in order for the President to promulgate the amendments to the Cuban Assets Control Regulations on April 20, 1982 legally, he could not use the "grandfather" clause but rather would have had to employ the procedures set out in the International Economic Emergencies Act, 50 U.S.C., Section 1701 *et seq.* Thus, according to the defendants, he would have had to declare a *new specific national emergency*, submit a report to Congress justifying his actions, consult with Congress before invoking the Act, submit periodic reports to Congress, and Congress would have to meet within six months to consider a vote on a concurrent resolution to determine whether the emergency should be terminated. 50 U.S.C., Sections 1621, 1702, and 1703. If the defendants are correct, it seems to me that when the President imposed the new regulations on April 20, 1982 imposing greater restrictions on travel to Cuba, there would have been some protest from someone in Congress that the President was exceeding his powers under the "grandfather" clause and not consulting Congress as he is required to do under the International Economic Emergencies Act. Yet the defendants have not pointed to a single instance, nor have I been able to find any, where a member of Congress has protested the administration's action, despite the fact that the imposition of greater restrictions on travel to Cuba was publicized. This, in my view, is a strong indication that the President's action in amending the Cuban Assets Control Regualtions [sic] on April 20, 1982 was a proper exercise of the power granted by Congress in the "grandfather" clause.

was a proper exercise of the power granted by Congress in the "grandfather" clause.

As an afterword, it is to be noted that I have analyzed the main issue as I see it as to whether or not the plaintiffs have shown a probability that they will prevail on the merits. However, there is no question that an injunction in this case would affect the government's conduct of its foreign affairs. There is law to the effect that in such cases, the burden on the plaintiffs is more than showing a probability of success on the merits—rather, it has been said to be that the plaintiffs must make an extraordinarily strong showing to succeed. *Adams* v. *Vance*, 570 F.2d 950, 955 (D.C. Cir., 1977).

IMMEDIATE IRREPARABLE HARM

"Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined. *Massachusetts Coalition Of Citizens With Disabilities et al.* v. *Civil Defense Agency And Office Of Emergency Preparedness Of The Commonwealth Of Massachusetts et al.*, 649 F.2d 71, 74 (1 Cir., 1981) citing *Parks* v. *Dunlop*, 517 F.2d 785 (5 Cir., 1975). In my opinion, none of the original plaintiffs has carried the burden of showing "immediate irreparable harm". As to some, any potential harm is not immediate. For example, plaintiff Howard does not seek to visit Cuba until December, 1982; plaintiff Turner seeks to visit Cuba "this winter." As to plaintiffs Wald and Lowe, other than convenience, there is no showing that it would be impossible for them to go to Cuba at a later time, perhaps during a semester or vacation break from teaching activities. The same is true for plaintiff Morales and even more so for the plaintiff Hageman, who also plans a trip to Cuba in 1983. It appears that plaintiff Bradley has been able to conduct the trip to Cuba by his students under the protection of Judge Mazzone's temporary restraining order. And a claim by the organizations who promote travel to Cuba that they will lose business in the interim is not a sufficient showing, especially since the tours are scheduled for September-December, 1982.

However, the intervening plaintiffs have, in my judgment, demonstrated immediate irreparable harm. According to the papers, a contract was signed in August, 1981, before the change in the regulations, providing for a guarantee that 800 tourists from Puerto Rico will attend the games scheduled for August 1-15, 1982 with the Puerto Rico Olympic Committee obligated to pay a guarantee of $90.00 plus a penalty (which depends on the days of notice given) for each tourist who does not appear. Thus, if the tourists are not permitted to go to the games, the Committee must pay at least $72,000 on their guarantee and may be liable for an additional $35,000 to $85,000 depending on how long notice of cancellation [sic] is delayed. Although it does not appear that any moneys have yet been paid to Cuba, in addition to the penalties, the Committee will have to refund the deposits made by the tourists, which have, in the interim, been used for "advertising, promotional and sports activities." Para. 10, Verified Intervening Complaint. In addition, unlike the original plaintiffs, delay will mean that they will not be able to see that which they are going to Cuba for—i.e., the games, which are being held just during the period August 1-15, 1982.

Thus, I find that the intervening plaintiffs have demonstrated immediate irreparable harm.

BALANCE OF HARM AS BETWEEN THE PLAINTIFFS AND THE DEFENDANTS, AND QUESTION OF THE PUBLIC INTEREST

The last two factors a Court must consider when determining whether or not to grant a preliminary injunction is the balance of harm as between the parties and the public interest. *Massachusetts Coalition Of Citizens With Disabilities et. al.* v. *Civil Defense Agency And Office Of Emergency Preparedness Of the Commonwealth Of Massachusetts, et. al., supra,* at 74 citing *Grimard* v. *Carlston,* 567 F.2d 1171, 1173 (1 Cir., 1978).

In my judgment, analyzing these two factors in this case leads to the conclusion that a preliminary injunction should not be entered. There is no question but that the amendments to the Cuban Assets Control Regulations were the result of a considered judgment by the executive branch on

a question of foreign policy—I do not believe that the plaintiffs would dispute that proposition, although they clearly do not approve of the policy. There can be little doubt that the grant of preliminary injunctive relief to the plaintiffs would significantly thwart the policy, which depends on its enforcement for its efficacy. And the harm to the government would be immediate. If the amendments to the regulations are upheld by the Courts after a hearing on the merits, the government will have been harmed by the thwarting of its considered policy which was effected pursuant to a valid grant of Congressional authority. As to the original plaintiffs, the harm to the government in granting them an injunction, in my view, is greater than the harm to them, which is neither immediate or irreparable. As to the intervening plaintiffs, although I find that they have demonstrated that they will suffer immediate irreparable harm, I do not see that as outweighing the harm to the government, not only on the basis of the thwarting of a considered judgment as to foreign policy but also in that a large sum of money will be transferred to Cuba if the tourists are allowed to go to Cuba, a transfer which the policy is specifically designed to prevent.

Lastly, unless the plaintiffs are able to show a strong showing that they are probably going to succeed on the merits, I view the public interest as being served by not enjoining the executive in a foreign policy matter until a decision on the merits of the controversy.

RECOMMENDATION

Accordingly, I RECOMMEND that the two Motions For A Preliminary Injunction be DENIED, for the reasons, in summary form, that (1) neither the original plaintiffs nor the intervening plaintiffs have shown a probability of success on the merits, (2) the original plaintiffs have not shown that they will suffer immediate irreparable harm, (3) in the circumstances of this case, the harm to the plaintiffs if an injunction is denied does not outweigh the harm to the government if an injunction is granted, and (4) absent a showing of probability of success on the merits and a showing of immediate irreparable harm, the public interest is not

served by enjoining the executive from enforcing regulations which represent a considered judgment with respect to foreign policy.

REVIEW BY THE DISTRICT COURT

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates for the United States District Court for the District of Massachusetts, any party who objects to these findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objection must specifically identify the portion of the findings, recommendations, or report to which objection is made and the basis for such objection. Failure to comply with this rule might preclude further appellate review. *See Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603 (1 Cir. 1980); *United States* v. *Pablo Escaboza Vega*, No. 81-1467 (1 Cir. May 24, 1982).

/S/ Robert B. Collings

ROBERT B. COLLINGS
United States Magistrate

JULY 16, 1982.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1690-T

RUTH WALD, MARIAN LOWE, ROSARIO MARALES, FRANCIS E. BRADLEY, REV. ALICE HAGEMAN, CUBA RESOURCES GROUP, ROBERT C. HOWARD, CENTER FOR CUBAN STUDIES, LINDA TURNER, PLAINTIFFS,

v.

DONALD REGAN, SECRETARY OF THE TREASURY, JOHN M. WALKER, JR., ASSISTANT SECRETARY OF THE TREASURY, DENNIS M. O'CONNELL, DIRECTOR OFFICE OF FOREIGN ASSETS CONTROL, GEORGE SHULTZ, SECRETARY OF STATE, AND RONALD WILSON REAGAN, PRESIDENT OF THE UNITED STATES, DEFENDANTS,

PUERTO RICO OLYMPIC COMMITTEE AND RAFAEL MORALES CUBANES, ON HIS OWN BEHALF AND ON BEHALF OF THE ASOCIACION DE TURISTAS OLIMPICOS DE PUERTO RICO (ATROPRICO), AND OTHER PUERTO RICO SPORTS FANS, INTERVENING PLAINTIFFS.

CORRECTION IN REPORT AND RECOMMENDATION

COLLINGS, U.S.M.

In the last paragraph on page 22 which continues on the top of p. 23 of the Report and Recommendation On Motions For Preliminary Injunction, issued this date, the words "defendant" and "defendants" appearing in the first, seventh (p. 22), fourteenth and twentieth lines (p. 23) should read "plaintiffs". This error has been corrected, and substite pages 22 and 23 are attached hereto.

/s/ Robert B. Collings
ROBERT B. COLLINGS
United States Magistrate

JULY 16, 1982.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil No. 82-1690-T

RUTH WALD, ET AL., PLAINTIFFS,

v.

DONALD REGAN, ET AL., DEFENDANTS.

TEMPORARY RESTRAINING ORDER

On consideration of plaintiff Francis E. Bradley's motion for a temporary restraining order, the accompanying papers and defendants' opposition thereto, it is hereby

ORDERED, that defendants, their servants, agents and employees are hereby temporarily restrained from interfering in any way, including by threats or subsequent punishment, with a trip to Cuba Mr. Bradley is scheduled to lead on or about July 9, 1982, for up to fourteen high school students from various Friends' schools, pending a further hearing on a motion for preliminary injunction.

/s/ P. David Mazzone
P. DAVID MAZZONE
United States District Judge

Date: JUNE 25, 1982 3:30 PM

APPENDIX H

STATUTES AND REGULATIONS INVOLVED

Prior to its amendment in 1977, Section 5(b)(1) of the Trading With the Enemy Act, 50 U.S.C. App. 5(b)(1), provided:

During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in

the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

Section 101(b) and (c) of Pub. L. No. 95-223, 91 Stat. 1625, provide:

> (b) Notwithstanding the amendment made by subsection (a) the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [Sept. 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.
>
> (c) The termination and extension provisions of subsection (b) of this section supersede the provisions of section 101(a) and of title II of the National Emergencies Act to the extent that the provisions of subsection

(b) of this section are inconsistent with those provisions.

Section 515.201 of the Cuban Assets Control Regulations, 31 C.F.R . 515.201, provides:

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated under this part, or any national thereof, or such transactions involve property in which a foreign country designated under this part, or any thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including without limitation, transfers, withdrawals, or exportations of, any proper-

ty or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose of which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) or (b) of this section is hereby prohibited.

(d) For the purposes of this part, the term "foreign country designated under this part" and the term "designated foreign country" mean Cuba and the term "effective date" and the term "effective date of this section" mean with respect to Cuba, or any national thereof, 12:01 a.m., e.s.t., July 8, 1963.

The present version of Section 515.560 of the Cuban Assets Control Regulations, 31 C.F.R. 515.560, provides:

Certain transactions incident to travel to and within Cuba.

(a)(1) *General license.* The transactions in paragraph (c) of this section are authorized in connection with travel to Cuba by:

(i) Persons who are officials of the United States Government or of any foreign government, or of any intergovernmental organization of which the United States is a member, and who are traveling on official business; (ii) persons who are traveling for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities; or (iii) persons, and persons traveling with them who share a common dwelling as a family with them, who are traveling to visit close relatives in Cuba.

(2) For purposes of this section, the term "close relative" means spouse, child, grandchild, parent, grandparent, great grandparent, uncle, aunt, brother, sister, nephew, niece, first cousin, or spouse, widow, or widower of any of the foregoing. The term "close relative" also means mother-in-law, father-in-law, daughter-in-law, son-in-law, sister-in-law, or brother-in-law.

(3) The general license contained in this section does not authorize transactions in connection with tourist travel to Cuba, nor does it authorize transactions in connection with business travel undertaken for any purposes other than those set forth in paragraph (a)(1) of this section.

(b) *Specific Licenses.* Specific licenses authorizing the transactions in paragraph (c) of this section will be issued in appropriate cases to persons desiring to travel to Cuba for humanitarian reasons, or for purposes of public performances, public exhibitions, or similar activities.

(c) The following transactions are authorized in connection with travel to and within Cuba by persons licensed under paragraphs (a) and (b) of this section:

(1) All transportation-related transactions ordinarily incident to travel to and from Cuba.

(2) All transactions ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person. This authorization may be used only once in every six consecutive months. Single copies of publications do not count against the $100 limit set forth in this subparagraph. For purposes of this section, the term "publications" includes books, newspapers, magazines, films, phonograph records, tapes, photographs, microfilm, microfiche, posters, and similar materials. All merchandise and publications obtained pursuant to this subparagraph shall be for noncommercial use only and shall not be resold.

(4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons to, from or within Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points

outside the United States; chartering an aircraft or vessel; arranging hotel accommodations, ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration for authorized services.

(5) All transactions concerning aircraft or vessels incidental to their nonscheduled flights or voyages to, from, or within Cuba. This subparagraph does not authorize the carriage of any merchandise to and from Cuba, except accompanied baggage and merchandise, including publications, authorized by paragraph (c)(3) of this section.

(6) All transactions incident to the processing and payment of checks, drafts, traveler's checks, and similar instruments negotiated in Cuba by any person under the authority of this section.

(d)(1) This section does not authorize the processing and payment by persons subject to U.S. jurisdiction, such as credit card issuers or intermediary banks, of credit card instruments (e.g., vouchers, drafts, or sales receipts) for expenditures in Cuba, and does not authorize a domestic credit card issue, or a foreign credit card firm owned or controlled by U.S. persons, to deal with a Cuban enterprise or with a third-country party, such as a franchisee, in connection with the extension of credit to any person in Cuba.

(2) Persons subject to U.S. jurisdiction are hereby authorized to process and pay credit card instruments for expenditures in Cuba where such instruments are dated prior to May 15, 1982. The authorization contained in this subparagraph shall expire at the close of business on July 15, 1982.

(e) Persons who travel to Cuba for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities are authorized to acquire and import into the United States, as accompanied baggage or otherwise, such publications, as defined in paragraph (c)(3) of this section, as are directly related to their professional ac-

tivities, without limitation as to value. Such merchandise may be acquired and imported only for their own professional use or that of their employers at the time of the travel, and may not be sold to other persons.

(f) Persons who travel in Cuba pursuant to provisions of this section shall not become nationals of Cuba solely because of such travel. This paragraph does not authorize any transaction prohibited by any other section of this part.

(g) This section does not authorize any person subject to the jurisdiction of the United States to make any investment in Cuba, establish any branch or agency in Cuba, or transfer any property to Cuba, except transfers by or on behalf of individual or group travelers, and aircraft or vessels, as expressly authorized in this section.

(h) *Professional research and similar activities.* (1) Paragraph (a)(1) of this section provides a general authorization for travel to, from, and within Cuba for professional research. Those covered by the "professional research" authorization are full-time professionals who travel to Cuba to do research in their professional areas, whose research is specifically related to Cuba and will constitute a full work schedule in Cuba, and where there is a substantial likelihood of dissemination of the product of such research. No transactions related to tourist or recreational travel within Cuba are authorized under the general license for professional research, except those that are consistent with a full schedule of research activities.

(2) "Similar activities" include attendance by professionals with an established interest in Cuba at professional meetings where research on Cuba is shared, and travel for research purposes specifically related to Cuba by persons who are working to qualify themselves academically as professionals (*e.g.*, certain graduate degree candidates). Study visits to Cuba in connection with pre-college or undergraduate college course work are not within the scope of professional

research and similar activities authorized by the general license.

(3) Categories of travel which do not qualify as professional research or similar activities and for which specific license requests will normally be denied include recreational travel; tourist travel; travel in pursuit of a hobby; general study tours; general orientation visits; student class field trips; youth camps; research for personal satisfaction only; travel by fishing or bird-watching groups and similar affinity groups; and any travel for an authorized research purpose, if the schedule of activities includes free time, travel, or recreation in excess of that consistent with a full work schedule of professional research and similar activities.

(4) A group does not fall within the general license for professional research or similar activities merely because some members of the group could qualify individually under the general license. For example, the presence of a professional fish biologist who travels to Cuba to engage in professional research does not bring within the general license other persons who might travel with the fish biologist but whose principal purpose in travel is to engage in recreational or trophy fishing. The fact that such persons may engage in certain activities with, or under the direction of, the professional fish biologist, such as measuring or recording facts about their catch, does not bring these individuals' activities within the meaning of professional research or similar activities.

(5) A person does not fall within the general license for professional research or similar activities merely because that person is a professional who plans to travel to Cuba. For example, a professor of history interested in traveling to Cuba for the principal purpose of learning or practicing Spanish or attending general lectures devoted to Cuban culture and contemporary life would not fall within the general license. A doctoral candidate in economics traveling to Cuba to undertake research for a dissertation on the Cuban economy

would fall within the general license for activities directly related to the research but would not be authorized by the general license to stay an extra week in Cuba in order to attend a seminar on Cuban arts and crafts.

(i) *Professional Meetings, Seminars, Conferences.* Specific licenses authorizing the transactions in paragraph (c) of this section will be issued in appropriate cases to persons desiring to travel to Cuba for purposes of participation in professional meetings, seminars, conferences, or similar gatherings, provided that the prospective traveler is a full-time professional in the field to which the meeting or similar gathering pertains; that planning and preparation for the meeting or similar gathering were underway prior to May 15, 1982; and that the meeting or similar gathering is scheduled to be held prior to December 31, 1982. Specific license requests pertaining to travel for attendance at professional meetings to be held after December 31, 1982, will generally be denied.

(j) For purposes of this section, all necessary transactions involving fully sponsored or hosted travel to, from, and within Cuba are authorized, provided that no person subject to U.S. jurisdiction shall make any payment or transfer of any property or provision of any service to Cuba or a Cuban national in connection with such travel. Travel shall be considered fully sponsored or hosted for purposes of this section notwithstanding a payment by a person subject to U.S. jurisdiction for transportation to and from Cuba, provided that the carrier furnishing the transportation is not a Cuban national.

The version of Section 515.560 of the Cuban Assets Control Regulations in effect from March 1977 through May 1982, 31 C.F.R. 515.560 (1977), provided:

Certain transactions incident to travel to and in Cuba.

(a) The following transactions are authorized:

(1) All transactions ordinarily incident to travel to and from Cuba.

(2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person, for personal use only. Such merchandise may not be resold. The authorization in this subparagraph may only be used once in every six consecutive months.

(4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons, to, from, or in Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points outside the United States; chartering an aircraft or vessel; arranging hotel accommodations in Cuba; ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration for authorized services.

(5) All transactions on behalf of aircraft or vessels incidental to nonscheduled flights or voyages to, from, and in Cuba. This paragraph does not authorize the carriage of any merchandise to and from Cuba except accompanied baggage and merchandise authorized by paragraph (a)(3) of this section.

(6) All transactions incident to the processing and payment of checks, drafts, traveler's checks, and similar instruments negotiated in Cuba by any person under the authority of this section.

(7) Processing and payment by United States credit card issuers of credit card instruments (vouchers, drafts, or sales receipts) for authorized expenditures in Cuba forwarded by credit card companies in third countries to the domestic issuer for payment or reimbursement. Foreign credit card firms owned or controlled by U.S. persons are authorized to contract with a Cuban enterprise for the extension of credit through

the use of credit cards. However, this paragraph does not authorize a domestic credit card issuer to contract with a Cuban enterprise for the extension of credit to any traveler for any purpose.

(b) Persons who travel to Cuba for the purpose of gathering news, making news or documentary films, engaging in professional research or for similar activities are authorized to acquire and import into the United States, as accompanied baggage or otherwise, such photographs, films, books, magazines, newspapers, and similar publications as are directly related to their professional activities, without limitation as to value. Such merchandise may only be acquired and imported for their own professional use or that of their employers at the time of the travel, and may not be sold to other persons.

(c) Persons who travel in Cuba after March 18, 1977, and who prior to that date were not designated nationals of Cuba are licensed as unblocked nationals. This subparagraph does not authorize any transaction prohibited by any other section of this part.

(d) This section does not authorize any person subject to the jurisdiction of the United States to make any investment in Cuba, establish any branch or agency in Cuba, or transfer any property to Cuba except transfers by or on behalf of individual or group travelers, and aircraft or vessels, as authorized in this section.

Office - Supreme Court, U.S
FILED
JAN 27 1984
ALEXANDER L. STEVAS

No. 83-436

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL.

v.

RUTH WALD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 14, 1983
CERTIORARI GRANTED NOVEMBER 28, 1983

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* The opinions of the district court and the court of appeals, and the report and recommendation of the magistrate on motions for preliminary injunction are printed in the appendices to the petition for a writ of certiorari and have not been reproduced here.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
6/17/82	Complaint for Declaratory and Injunctive Relief; Notice of Motion for Preliminary Injunction
6/23/82	Motion for Temporary Restraining Order on behalf of Plaintiff Bradley
6/25/82	Temporary Restraining Order issued
7/16/82	Magistrate's Report and Recommendation re Plaintiffs' Motions for Preliminary Injunction
7/22/82	District Court Decision Denying Plaintiffs' Motion for Preliminary Injunction
8/19/82	Notice of Appeal
5/16/83	Court of Appeals' Decision Vacating District Court's Order and Remanding with Instructions to Issue a Preliminary Injunction
6/16/83	Court of Appeals' Memorandum and Order Denying Petition for Rehearing and Denying Stay of Mandate
6/23/83	Application for Stay of Mandate filed in Supreme Court
7/ 6/83	Order of Supreme Court granting stay of mandate
9/14/83	Petition for a Writ of Certiorari filed
11/28/83	Order of Supreme Court granting petition for a writ of certiorari

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civ. No. ———

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LINDA TURNER
1126 West Wolfman Street
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(312) 327-0006, PLAINTIFFS

—against—

DONALD REGAN,
Secretary of the Treasury,
Department of the Treasury
Washington, D.C. 20220;

JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury
Department of the Treasury
Washington, D.C. 20220;

DENNIS M. O'CONNELL,
Director, Office of Foreign Assets Control,
Department of the Treasury
Washington, D.C. 20220;

ALEXANDER M. HAIG, JR.,
Secretary of State
Washington, D.C. 20520;

RONALD WILSON REAGAN,
President of the United States
The White House
Washington, D.C. 20500, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Statutory and Constitutional Rights)

I. *INTRODUCTION*

1. This is an action seeking an order declaring illegal, defendants' new restrictions on travel-related transactions with Cuba, 32 C.F.R. 515.560 (April 20, 1982) and enjoining their implementation. The new restrictions are not authorized by the Trading With the Enemy Act, 50 U.S.C. App. § 5; violate express limitations Congress has imposed in 22 U.S.C. § 211a on the Executive Branch's power to impose geographical restrictions on travel; have been promulgated in violation of the International Emergency Economic Powers Act, 50 U.S.C. § 1701-06; and violate rights secured by the United States Constitution.

II. *JURISDICTION*

2. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, and 1361, over causes of action arising under 5 U.S.C. §§ 701-706, 50 U.S.C. 1701, *et seq.*, and the First and Fifth Amendments to the Constitution of the United States.

3. Venue is proper under 28 U.S.C. § 1391(e).

III. *PARTIES*

4. Plaintiffs are:

(a) Ruth Wald, a citizen of the United States, residing in Cambridge, Massachusetts. She is a Professor of Biology at the Biological Laboratories of Harvard University. She plans to visit Cuba in August 1982, to meet and make political contact with Cuban women.

(b) Marian Lowe is a citizen of the United States, residing in Cambridge, Massachusetts. She is Associate

Professor of Chemistry at Boston University. She is curious about Cuba and plans to visit Cuba in August 1982, to talk with Cuban women.

(c) Rosario Morales is a citizen of the United States, residing in Cambridge, Massachusetts. She has friends in Cuba whom she plans to visit this summer, having travelled there twice previously, most recently in 1979 when she travelled with her husband who was hired by UNESCO to do ecological work in Cuba.

(d) Francis E. Bradley, a United States citizen residing in Newtown, Bucks County, Pennsylvania, is Assistant Headmaster of a secondary school operated by the Society of Friends (Quakers) in Bucks County, Pennsylvania. He plans to travel to Cuba on June 18, 1982 as the leader of a group of students from various Friends' schools. The purpose of the trip is educational, and the trip has been planned and organized since autumn, 1981. Defendants have verbally denied a written application for a license for Mr. Bradley and the Friends schools trip, although they have never received the written response which they have been told would be forthcoming. Mr. Bradley led a similar group of students to Cuba in 1978.

(e) The Reverend Alice Hageman, a United States citizen residing in Boston, Massachusetts is co-Pastor of the Church of the Covenant (United Church of Christ and United Presbyterian Church, USA) who plans to travel to Cuba in the summer of 1982. She has recently led a trip of laypeople and clergy and students to study religion in Cuba, and is already engaged in planning a similar trip in the summer of 1983. She has also been invited and plans to spend two weeks in Cuba in August, 1982. All of Rev. Hageman's expenses for that trip would be paid by Cuban residents in Cuban currency, and she would therefore spend no United States or other foreign currency during this trip to Cuba.

(f) Plaintiff the Cuba Resource Group is an unincorporated association serving as a resource and information

center about Cuba. Among the services that the Group provides are arranging tours and providing referral services as to what trips to Cuba are available. The Group receives and depends on financial remuneration for the services it provides for those services.

(g) Robert C. Howard, a citizen of the United States residing in Chicago, Illinois, cancelled his plans to travel to Cuba with his children in December 1982, as a result of the new regulation. The purpose of the trip was to enable Mr. Howard and his children to learn about the country, its people and culture.

(h) Plaintiff, The Center for Cuban Studies, is a not-for-profit corporation which has, for the past ten years, organized tours to Cuba of United States citizen journalists, psychiatric personnel, lawyers, Latin Americanists, economists, teachers, cultural workers, public health workers, women's groups and others who have engaged in general educational activities and in specific news gathering and research. As part of its program, it plans to send to Cuba in the future, individuals and groups of similar composition and character, who will engage in general educational activities in each discipline and who will meet with their counterparts in Cuba in informal and non-conference settings.

(i) Linda Turner, a citizen of the United States, residing in Chicago, Illinois, is a secretary. She plans to travel to Cuba this winter, as she has done for the past several years, in order to gain information necessary to her activities aimed at educating Americans about life in Cuba.

5. Defendants are:

(a) Donald Regan is sued in his official capacity as Secretary of the Treasury of the United States. He is responsible for the promulgation and enforcement of the challenged regulation.

(b) John M. Walker is sued in his official capacity as Assistant Secretary of the Treasury. Defendant Walker

approved the challenged regulation and is responsible for its enforcement.

(c) Dennis O'Connell is sued in his official capacity as Director of the Office of Foreign Assets Control of the Department of the Treasury. Defendant O'Connell promulgated the new regulation and is in charge of its enforcement.

(d) Alexander Haig, Jr., is sued in his official capacity as Secretary of State of the United States. On information and belief, the Department of State instigated and participated in the decision to issue the challenged regulation.

(e) Ronald Wilson Reagan is sued in his official capacity as President of the United States. Defendant Reagan is the sole officer of the United States with authority to prohibit certain transactions under the Trading With the Enemy Act and the International Emergency Economic Powers Act, and the challenged regulation has been issued pursuant to that authority.

IV. *STATEMENT OF THE CASE*

6. The Cuban Assets Control Regulations promulgated and enforced by defendants ban all transactions with Cuba except those especially authorized by regulation. 31 CFR Part 515. Violation of the Regulations is a felony punishable by imprisonment for not more than 10 years and/or a fine of not more than $50,000. 50 U.S.C. App. § 16.

7. Effective March 21, 1977, the Cuban Assets Control Regulations authorized "all transactions ordinarily incident to travel to and from . . . [and] in Cuba." 31 CFR § 515.560(a)(1, 2), 42 Fed. Reg. (March 29, 1977). Accordingly, persons subject to United States jurisdiction were free to engage in transactions incident to travel to, from and in Cuba.

8. On April 20, 1982, 31 CFR § 515.560 was amended to restrict travel-related transactions with Cuba by United States citizens and other persons subject to United States jurisdiction. The amendment became effective May 15, 1982.

9. As interpreted by defendants, § 515.560 bars all travel by United States persons to, from and in Cuba (other than those referred to in ¶¶ 11 and 12) even if their travel results in no transfer of currency to Cuba.

10. The effect of § 515.560 as amended was intended to be and will be to eliminate educational, religious, tourist and business travel to Cuba.

11. As now amended, § 515.560 includes a "general license" which authorizes travel to Cuba, without prior Treasury Department permission, solely for persons who fall into the following categories:

(a) United States or foreign officials or officials of inter-governmental organizations of which the United States is a member, provided that the officials are travelling on official business;

(b) Persons "travelling for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities; and

(c) Persons and their families "who are travelling to visit close relatives in Cuba".

12. All other persons desiring to travel to Cuba must apply for a specific license that will only be granted "in appropriate cases to persons desiring to travel to Cuba for humanitarian reasons, or for purposes of public performances, public exhibitions, or similar activities."

13. The Cuban Assets Control Regulations prevent plaintiffs from traveling and/or facilitating travel to Cuba in that either such travel does not fall within the exceptions to the restrictions on travel-related transactions

with Cuba or the regulations are so vague as to deter plaintiffs from engaging in or facilitating such travel.

14. The restrictions imposed by the amendment of § 515.560 are invalid and unlawful for the following reasons:

(a) The restrictions are intended to be and are geographical limitations on travel in violation of the restrictions Congress imposed on the Executive Branch's authority to institute such limitations in 22 U.S.C. § 211a;

(b) The restrictions are in excess of the authority conferred by the Trading With the Enemy Act, 50 U.S.C. App. § 5;

(c) The restrictions are in excess of the authority conferred by the International Emergency Economic Powers Act, 50 U.S.C. § 1701, *et seq.* [IEEPA];

(d) The restrictions have not been properly promulgated under IEEPA and are therefore void and of no effect;

(e) The restrictions are vague, in violation of the First and Fifth Amendments;

(f) The restrictions deprive plaintiffs of their First Amendment rights;

(g) The restrictions deprive plaintiffs of liberty, including the right to travel, without due process of law in violation of the Fifth Amendment;

(h) The restrictions are being administered by defendants without standards or proper procedures to guide their discretion, and in a discriminatory and arbitrary manner, in violation of the due process clause of the Fifth Amendment;

(i) The restrictions deprive plaintiffs of the equal protection of the laws in violation of the Fifth Amendment.

15. The restrictions have caused and will continue to cause plaintiffs irreparable injury, for which they have no adequate remedy at law.

PRAYER

WHEREFORE, plaintiffs request that the Court

16. (a) Declare the April 20, 1982 amendment of 31 C.F.R. § 515.560 invalid and unconstitutional on its face and as applied;

(b) Grant plaintiffs a preliminary and permanent injunction, prohibiting the enforcement of said amendment of 31 C.F.R. § 515.560, and enjoining defendants from interfering with plaintiffs' travel to Cuba; and

(c) Grant such other and further relief, including costs and attorneys' fees, as the Court may deem just and proper.

Dated: June 16, 1982.

/s/ Leonard B. Boudin
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civ. No. 82-1690-T

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(312) 327-0006, PLAINTIFFS

—against—

DONALD REGAN,
Secretary of the Treasury,
Department of the Treasury
Washington, D.C. 20220;

JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury
Department of the Treasury
Washington, D.C. 20220;

DENNIS M. O'CONNELL,
Director, Office of Foreign Assets Control,
Department of the Treasury
Washington, D.C. 20220;

ALEXANDER M. HAIG, JR.,
Secretary of State
Washington, D.C. 20520;

RONALD WILSON REAGAN,
President of the United States
The White House
Washington, D.C. 20500, DEFENDANTS

NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Ruth Wald, sworn to the 7th day of June 1982, Marian Lowe, Reverand Alice Hageman and Linda Turner, sworn to the 8th day of June 1982, Francis E. Bradley and Robert Howard, sworn to the 4th day of June 1982, Karen Wald, sworn to the 5th day of June 1982, and Sandra Levinson and Harold A. Mayerson, sworn to the 14th day of June 1982, and upon all the pleadings and proceedings heretofore had herein, counsel for plaintiffs will move this court pursuant to Rule 65 of the Federal Rules of Civil Procedure, for an order, enjoining defendants pending the trial and disposition of this action, from enforcing the amendment to 31 C.F.R. 515.560 dated April 20, 1982 and enjoining defendants from interfering with plaintiffs' travel to Cuba.

Dated: New York, New York
June 16, 1982

Yours etc.,

/s/ Leonard B. Boudin
LEONARD B. BOUDIN
ERIC M. LIEBERMAN
JULES LOBEL
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TO: United States Attorney
1107 John W. McCormack
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Boston, Massachusetts 02109

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civ. Action No. ———

RUTH WALD, ET AL., PLAINTIFFS

—against—

DONALD REGAN, ET AL., DEFENDANTS

AFFIDAVIT

COUNTY OF NEW YORK)
) SS.:
STATE OF NEW YORK)

HAROLD A. MAYERSON, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before the Courts of the State of New York and am a member of the firm of Mayerson and Smith, P.C., located in the City of New York.

2. During the last decade I have represented and counselled numerous individuals and groups who have traveled to Cuba with reference in United States laws and regulations governing travel between the two countries.

3. In addition, I have represented several domestic not-for-profit organizations and business enterprises including a travel agency which specializes in trips to Cuba, which have entered into commercial transactions with Cuba pursuant to either United States Department of Commerce or Treasury Department regulation.

4. Based upon the foregoing I have followed with great care virtually all aspects of United States-Cuba relations and have had numerous meetings and conversations with

officials of the United States Government, including the Department of State, the Department of the Treasury and the Department of Commerce.

5. On or about April 19, 1982, I was made aware of the promulgation of new regulations affecting travel by persons subject to the jurisdiction of the United States traveling to Cuba. I immediately arranged to meet with representatives of the Department of State and the Department of the Treasury and did so on April 20, 1982. I sought the above referred to meetings in order to better assist clients in understanding what type of travel to Cuba was affected by the new regulations.

6. At those meetings I inquired as to whether persons who traveled to Cuba, who did not fall within the category of a general licensee or had not received a specific license, without any financial benefits inuring to Cuba were proscribed from going. I was told by an official of the Office of Foreign Assets Control (OFAC) that he believed that such travel was barred by the new regulation.

7. As a result of my meeting with OFAC I sent a letter on April 27, 1982 stating my views on the meeting and my opinion on the new regulations. (See Exhibit A annexed hereto).

8. As of the date of this affidavit I have not received a written response to this letter. However, I have discussed the contents of my letter on numerous occasions with Raymond Konan, General Counsel of OFAC. He has informed me that it is the position of OFAC that no person subject to U.S. jurisdiction may travel to Cuba unless that person falls within the general license categories or receives a specific license. Mr. Konan stated that even if a person's travel results in no financial benefit to Cuba, through the transfer of currency, such travel is not authorized and such persons could be the subject of enforcement proceeding.

9. Notwithstanding my strenuous arguments that this interpretation of the regulation was contrary to the expressed intent of the new regulations which is to only

govern control of currency transfers to Cuba and not to ban travel, Mr. Konan maintained that this was the position of OFAC.

10. The press release issued by the Department of the Treasury on April 19, 1982, concerning the new travel restrictions to Cuba stated that the purpose of restrictions was to reduce the flow of hard currency to Cuba. (See Exhibit B annexed hereto). The press release further indicated that the new regulations would cut approximately forty percent (40%) of the present level of travel. Therefore, by the Department of the Treasury's estimate only eight million dollars ($8,000,000.00) that now flows to Cuba from travel will be cut off.

11. In addition, the recently enacted regulations make no mention of the substantial trade between the United States and Cuba that is presently permitted by the Department of the Treasury. From January 1980 through September 1981 the Office of Foreign Assets Control authorized United States overseas subsidiaries to buy or sell from and to Cuba goods and commodities with a total value of three hundred and seventy-six million dollars ($376,000,000.00).

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Harold A. Mayerson
HAROLD A. MAYERSON

Sworn to before me this
14th day of June, 1982
JAMIL GILBERT
NOTARY PUBLIC, State of New York
No. 4678704
Qualified in New York County
Term Expires March 20, 1984

NOTARY
Jamil Gilbert

EXHIBIT A

April, 27, 1982

Dennis O'Connell, Director
Office of Foreign Assets Control
U.S. Department of the Treasury
1331 G Street, N.W.
Washington, D.C. 20220

Dear Mr. O'Connell:

Thank you for the opportunity of meeting with you and your staff to discuss the recently enacted amendment to the Cuban Assets Control Regulations as they affect the right of persons subject to the jurisdiction of the United States to travel to Cuba.

Marazul Tours, Inc. (Marazul) has decided to remain in the business of sponsoring charter flights to Cuba and booking passengers on other airlines which fly to Cuba. However, one of its principle concerns in continuing this work is the manner in which your office will interpret the new regulation and what types of guidelines will be issued to enable United States businesses to fully understand their responsibilities under the new regulation. While we recognize that all questions of mutual concern will not fall into black and white areas it is important from a legal and business point of view to minimize the gray areas.

My analysis of the regulations have led me to the following conclusions which I have shared with my clients.

1. Charter air operations to Cuba sponsored by persons subject to the jurisdiction of the United States are permitted by the Cuban Foreign Assets Control Regulations.

2. Travel agencies, such as Marazul, may arrange for travel by persons subject to United States jurisdiction on scheduled or non-scheduled airlines within and without the United States and for land accommodations in Cuba unless they wilfully violate 31 CFR § 515.560.

3. All persons subject to the jurisdiction of the United States may travel to Cuba if they do not pay Cuba any funds either by way of air travel, i.e. through the use of Cubana or funds for their living expenses while in Cuba except that persons under subsection (a)(1) of the newly enacted 31 CFR § 515.560 may pay for air travel to and from Cuba and for living expenses while in Cuba.

At our meeting on April 22, 1982 the following areas of concern were raised by OFAC and Marazul.

A. What procedures should Marazul employ with reference to its employees or counsel who must travel to Cuba in order to facilitate the travel of persons subject to the jurisdiction of the United States to Cuba? I believe the simplest procedure would be for your office to issue a special license to Marazul Tours and its counsel Mayerson & Smith, P.C. for them to travel to Cuba for a period of six months and that a record of such travel be made available for inspection of OFAC pursuant to the Cuban Assets Control Regulations.

B. What obligations does Marazul have towards the enforcing of 31 CFR § 515.560? I have instructed my clients that they are permitted to handle air passage and land accommodation arrangements for persons wishing to go to Cuba. I have further instructed them that all employees of the corporation should familiarize themselves with the regulations and that the regulations should be made available to all customers who wish to see them. I have further instructed the employees of the corporation that they should not book any passengers who state to them that they are going to Cuba for tourist or business purposes without having received a specific license, and that if any person asks an employee of the corporation for an interpretation of the newly enacted regulation that the person should be referred to OFAC.

C. What constitutes persons engaged in "professional research or other similar activities"? With reference to visits to Cuba that involve *bona fide* study in that country, I have instructed my client that they may arrange

for travel and land accommodations for such groups and individuals. Attached is a sample list of study seminars that Marazul has conducted. I have instructed my client that such visits are permissable and that Marazul employees have no obligation to ascertain the credentials of persons who join said groups.

D. Who may Marazul assist in coming to the United States from Cuba? I have instructed Marazul that they may arrange travel for all persons located in Cuba who wish to travel to the United States provided that such persons have a United States visa, are traveling under a United States passport or are diplomats or persons who work for international organizations of which the United States is a member.

E. Can Marazul arrange for Cubans in the United States to return to Cuba? I have instructed my clients that they may arrange travel to Cuba for all residents of Cuba who are in the United States.

If you have any further questions or comments please feel free to communicate with me.

I remain,

Very truly yours,

HAROLD A. MAYERSON

HAM:tl
cc: Francisco Aruca
Gordon Johnson

SAMPLE STUDY TRIPS

1. Health Care Seminars—

   This seminar includes conferences with representatives of the Ministry of Public Health; visits to hospitals—maternity, pediatrics, psychiatric, orthopedic etc.; conferences with health providers, including physicians, nurses, paraprofessionals, psychiatrists and psychologists; and conferences with Cuban officials and citizens re: Cuba's innoculation and preventative health care system.

2. Religious Study Seminars—

   This seminar includes conferences with the Ecumenical Council of Cuba; meetings with church leaders of various denominations; visits to Protestant and Catholic seminaries; conferences with religious and lay persons with reference to the role the church enjoys in Cuba; conferences with representatives of the Cuban government; and attendance and participation in services.

3. University and High School Comparative Government Seminars—

   This seminar includes, visits to primary, secondary, technical school and universities; conferences with teachers, professors and students; conferences with representatives of the Ministries of Education and Higher Education; meetings with the Federation of Cuban Women; visits to health care facilities; visits to food production facilities and food distribution centers.

4. Architecture—Urban Planners—Housing Seminars—

   This seminar includes, visits to technical schools and universities where professionals and technicians are

trained; conferences with professors and students; conferences with respresentatives of the Ministry of Construction; conferences with architects, city planners, and construction worker conferences with trade union officials; and visits to construction sites and housing developments.

EXHIBIT B

TREASURY NEWS
Department of the Treasury
Washington, D.C.
Telephone 566-2000

Contact: Marlin Fitzwater
566-5252

U.S. RESTRICTS TRANSACTIONS RELATING TO TRAVEL TO CUBA

The Department of Treasury today announced new restrictions on travel-related transactions with Cuba. The effect will be to eliminate tourist and business travel to that country.

The restrictions will take effect on May 15.

John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations said: "Today's actions are an important part of this government's policy of tightening the current trade and financial embargo against Cuba and are designed to reduce Cuba's hard currency earnings from travel by persons subject to the jurisdiction of the United States."

The changes remove the general authorization for transactions connected with travel to Cuba and limit such authorization to three principal categories of travel: Official travel, travel by news media personnel and researchers, and humanitarian travel for purposes of family reunification with close relatives in Cuba.

Transactions relating to general tourist and business travel to Cuba are no longer authorized. However, Treasury authorization through specific licenses may be obtained in appropriate cases for persons wishing to travel to Cuba for humanitarian reasons other than family reunification or for purposes of participation in public performances or exhibitions.

The most recent twelve-month statistics indicate that approximately 38,000 people visited Cuba from the United States, of which approximately 40% travelled for purposes other than family reunification.

The current program restricting trade and financial transactions with Cuba dates back to 1963. Since then, all such transactions have been regulated by the Treasury Department's Office of Foreign Assets Control. Any transaction with Cuba by a U.S. company or individual must be authorized by a general or specific license from that Office.

DEPARTMENT OF THE TREASURY
Office of Foreign Assets Control
31 C.F.R. Part 515
Cuban Assets Control Regulations:

Travel-Related Transactions

AGENCY: Office of Foreign Assets Control

ACTION: Final Rule

SUMMARY: The Office of Foreign Assets Control is amending section 515.560 of the Cuban Assets Control Regulations to reduce Cuba's hard currency earnings from travel by U.S. persons to and within Cuba. As amended, the general license for travel-related transactions set forth in section 515.560 will be limited to travel for specified purposes, including official travel, visits to close relatives, and travel connected with research, newsgathering, or similar activities. Transactions relating to ordinary tourist or business travel will no longer be permitted. However, specific licenses may be granted in appropriate cases for humanitarian reasons or for purposes of public performances in Cuba, as in connection with cultural or sports-related activities.

The processing and payment of credit card instruments, and transactions in connection with the extension of credit to any person in Cuba, are no longer authorized.

EFFECTIVE DATE: May 15, 1982

FOR FURTHER INFORMATION: Raymond W. Konan, Chief Counsel, Office of Foreign Assets Control, Department of the Treasury, Washington, D.C. 20220, tel. (202) 376-0236.

SUPPLEMENTARY INFORMATION: Since the Regulations involve a foreign affairs function, the provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable.

Similarly, because the amendment is issued with respect to a foreign affairs function of the United States, it is not subject to Executive Order 12291 of February 19, 1981, dealing with Federal regulations.

31 C.F.R. Part 515 is amended as follows:

Section 515.560 is amended to read as follows:

515.560 *Certain transactions incident to travel to and within Cuba.* [Amended]

(a)(1) *General License.* The transactions in paragraph (c) of this section are authorized in connection with travel to Cuba by (i) persons who are officials of the United States Government or of any foreign government, or of any intergovernmental organization of which the United States is a member, and who are traveling on official business; (ii) persons who are traveling for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities; or (iii) persons, and persons traveling with them who share a common dwelling as a family with them, who are traveling to visit close relatives in Cuba.

(2) For purposes of this section, the term "close relative" means spouse, child, grandchild, parent, grandparent, uncle, aunt, brother, sister, nephew, niece, first cousin, or spouse, widow, or widower of any of the foregoing.

(3) The general license contained in this section does not authorize transactions in connection with tourist travel to Cuba, nor does it authorize transactions in connection with business travel undertaken for any purposes other than those set forth in paragraph (a)(1) of this section.

(b) *Specific Licenses.* Specific licenses authorizing the transactions in paragraph (c) of this section will be issued in appropriate cases to persons desiring to travel to Cuba for humanitarian reasons, or for purposes of public performances, public exhibitions, or similar activities.

c) The following transactions are authorized in connection with travel to and within Cuba by persons licensed under paragraphs (a) and (b) of this section:

(1) All transportation-related transactions ordinarily incident to travel to and from Cuba.

(2) All transactions ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person. This authorization may be used only once in every six consecutive months. Single copies of publications do not count against the $100 limit set forth in this subparagraph. For purposes of this section, the term "publications" includes books, newspapers, magazines, films, phonograph records, tapes, photographs, microfilm, microfiche, posters, and similar materials. All merchandise and publications obtained pursuant to this subparagraph shall be for noncommercial use only and shall not be resold.

(4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons to, from, or within Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points outside the United States; chartering an aircraft or vessel; arranging hotel accommodations, ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration for authorized services.

(5) All transactions concerning aircraft or vessels incidental to their nonscheduled flights or voyages to, from, or within Cuba. This subparagraph does not authorize the carriage of any merchandise to and from Cuba, ex-

cept accompanied baggage and merchandise, including publications, authorized by subparagraph (c)(13) of this section.

(6) All transactions incident to the processing and payment of checks, drafts, traveler's checks, and similar instruments negotiated in Cuba by any person under the authority of this section.

(d)(1) This section does not authorize the processing and payment by persons subject to U.S. jurisdiction, such as credit card issuers or intermediary banks, of credit card instruments (*e.g.*, vouchers, drafts, or sales receipts) for expenditures in Cuba, and does not authorize a domestic credit card issuer, or a foreign credit card firm owned or controlled by U.S. persons, to deal with a Cuban enterprise or with a third-country party, such as a franchisee, in connection with the extension of credit to any person in Cuba.

(2) Persons subject to U.S. jurisdiction are hereby authorized to process and pay credit card instruments for expenditures in Cuba where such instruments are dated prior to May 15, 1982. The authorization contained in this subparagraph shall expire at the close of business on July 15, 1982.

(e) Persons who travel to Cuba for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities are authorized to acquire and import into the United States, as accompanied baggage or otherwise, such publications, as defined in subparagraph (c)(3) of this section, as are directly related to their professional activities, without limitation as to value. Such merchandise may be acquired and imported only for their own professional use or that of their employers at the time of the travel, and may not be sold to other persons.

(f) Persons who travel in Cuba pursuant to provisions of this section shall not become nationals of Cuba solely because of such travel. This paragraph does not authorize any transaction prohibited by any other section of this part.

(g) This section does not authorize any person subject to the jurisdiction of the United States to make any investment in Cuba, establish any branch or agency in Cuba, or transfer any property to Cuba, except transfers by or on behalf of individual or group travelers, and aircraft or vessels, as expressly authorized in this section.

Dated: April 19, 1982

/s/ Dennis M. O'Connell
DENNIS M. O'CONNELL
Director

Approved: /s/ John M. Walker, Jr.
JOHN M. WALKER, JR.
Assistant Secretary

Filing Date: April 19, 1982

Publication Date: April 20, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 82-

RUTH WALD,
21 Lakeview Avenue
Cambridge, Massachusetts 02138
(617) 868-7748; ET AL., PLAINTIFFS

—against—

DONALD REGAN,
Secretary of the Treasury,
Department of the Treasury,
Washington, D.C. 20220; ET AL., DEFENDANTS

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SANDRA LEVINSON, being duly sworn, deposes and says:

1. I am and have been the Executive Director of the Center for Cuban Studies for the past ten years. The Center for Cuban Studies (hereinafter "the Center") is a not-for-profit corporation, organized under the laws of the State of New York and has, since its inception, had both tax-exempt and tax-deductible status, pursuant to Section 501(c)(3) of the Internal Revenue Code.

2. Throughout its existence, the Center, headquartered in the City of New York, has functioned as a library and resource center open to all persons who are interested in

any aspect of Cuban society. It has also provided specific library and resource services to members of a wide variety of academic and professional disciplines, including economists, sociologists, political scientists, journalists, writers, health personnel and cultural workers.

3. As a continuing part of its regular program, it has arranged for study tours to Cuba of persons in a variety of specialized areas who travel there for specific, discrete research projects as well as for more general study and familiarization with Cuban institutions and Cuban citizens who are their professional counterparts.

4. The Center has arranged for study tours for both professionals and non-professionals alike who are interested in the study of the various aspects of Cuban society. For example, over the past several years, the Center has arranged for tours of people interested in the following areas:

1. Women in Cuba. (Ex. A)
2. The Cuban economy. (Ex. B)
3. Cuban culture.
4. Cuban education, at all levels. (Ex. C)
5. Cuban politics. (Ex. C)
6. The Cuban health system. (Ex. D)
7. Cuban law.

5. Consistent with its programs, in or about January 1982, the Center received several hundred applications from persons in a variety of disciplines, seeking acceptance in an interdisciplinary study tour program scheduled for July 16th to August 16th, 1982. The tour was to have included, as an integral part of its program, study of the Spanish language as it is spoken in Cuba, and professional seminars in several disciplines. Most of the participants are conversant with the Spanish language at some level and for many of the participants accepted in the program, Spanish is a language in which they are fully conversant.

6. Following the promulgation of the amendment to 31 C.F.R. 515.560 on April 19, 1982, and before the effective date of the regulation on May 15, 1982, the Center wrote to each of those participants in the summer program, advising them of the amendment to the regulations and seeking from them specific information relating to their professional intentions in participating in the summer program. A copy of the Center's letter of April 28, 1982 is appended hereto as Exhibit E, and sample copies of responses from the tour participants are annexed hereto as Exhibits F1-F .

7. Thereafter, the Center, by letter dated June 1, 1982, wrote to the Director, Office of Foreign Assets Control, describing in detail both the interdisciplinary nature of the study tour and the names and professional or other affiliations of the participants. A copy of that letter is annexed hereto as Exhibit G.

8. On June 4, 1982, I received a telephone call from Mrs. Marilyn Muensch, Chief of Licensing, Office of Foreign Assets Control, advising that her office had decided that the Center's interdisciplinary study tour did not qualify as "professional research or similar activities" and stating that the tour did not meet the Department's unarticulated standards. See Exhibit G.

9. Both by letter of June 1, 1982, and in the oral colloquy referred to in paragraph 8 *supra*, the Center sought a specific license pursuant to 515.560(3)(b), in the event that Foreign Assets Control did not acknowledge that the interdisciplinary study tour met that office's standards for a general license exception. The application has been denied by Foreign Assets Control. See Exhibit G.

10. The Center has projected study tours in the period September-December, 1982, in the areas of literature, music, film, economics and politics.

11. The actions of the Treasury Department, as generally reflected in the amendment to 515.560, represents an assault on the continued ability of the Center to function as an institution for learning and scholarship. It

makes it impossible for the Center to offer to both the general public and to those interested in specific areas of interest, first-hand access to Cuban experts and to raw materials such as newspapers, magazines, technical journals, and specific periodicals currently available only in Cuba. Should these regulations remain as presently drawn, the United States public will be deprived of information and analysis in areas which are critical to public understanding of Cuban society and thus to the making of public policy in our democratic society.

/s/ Sandra Levinson
SANDRA LEVINSON

Sworn to before me this
14th day of June, 1982.

/s/ Sherry Wertheimer
SHERRY WERTHEIMER
Notary Public, State of New York
No. 03-01 WE 4614743
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1983

EXHIBIT A

CENTER FOR CUBAN STUDIES
220 East 23rd Street, New York, N.Y. 10010
(212) 685-9038

WOMEN'S STUDY TOUR TO CUBA

August 16-23, 1981

THEME: The Achievements of Cuban Women and Socialist Legality

Sunday, August 16:

Arrive in Havana via charter from Miami.

Transfer to your hotel for an informational meeting.

Evening free to walk around.

Monday, August 17:

Morning bus tour of modern and colonial Havana.

Afternoon visit to the Federation of Cuban Women's (FMC) activists' training school "Fe del Valle".

Evening informal get-together with Cuban women in private home.

Tuesday, August 18:

Morning meeting with the Union of Cuban Jurists.

Afternoon visit to the Museum of the Revolution.

Evening visit to a "Casa de cultura" to observe classes in dance, theater, art, etc.

Wednesday, August 19:

Morning visits to the Alamar housing district outside of Havana and to a textile factory, where most of the workers are women.

Afternoon visit to a Pioneer Palace, the children's recreation and education center.

Evening free.

Thursday, August 20:

Attend a session of a Popular Tribunal in the morning and talk with judges and lawyers.

After lunch, visit a new rural community.

Evening cultural event—theater, dance or music.

Friday, August 21:

Morning visit to the world-famous Havana Psychiatric Hospital.

Afternoon visit to a training school for day care teachers.

Evening free.

Saturday, August 22:

Morning meeting at the national offices of the FMC.

Afternoon visit to the artisans' market in the Plaza de Catedral.

Evening farewell party in a private home.

Sunday, August 23:

Departure via charter to Miami.

PRICE: $750. Includes airfare (Miami-Havana round trip), visas, transfers, accommodations based on double occupancy, three meals per day, program, and a tour leader from the Center for Cuban Studies, in addition to the Cubatur guide. The hotel is a deluxe hotel (hopefully the Nacional, although we don't yet know for sure).

DEPOSIT DUE DATE: A deposit of $150.00 should be sent to the Center no later than JULY 1st if you want to ensure a place on the tour.

EXHIBIT B

CENTER FOR CUBAN STUDIES
220 East 23rd Street, New York, N.Y. 10010
(212) 685-9038

INTRODUCTION TO CUBA AND ITS SOCIALIST ECONOMY

When Fidel Castro and the 26th of July Movement came to power in Cuba 22 years ago, few outside of Cuba knew what to expect. We in the United States were remarkably ignorant of the lengthy revolutionary history of Cuba, for example, what the Cubans refer to as their "100 years of struggle."

In these 22 years we have remained ignorant, to a considerable degree, of the economic and political process which have made Cuba the only socialist state in the Western Hemisphere. The continuing U.S. economic blockade of Cuba, and the fact that the United States broke diplomatic relations in 1961, are largely responsible for this lack of information.

Today it is more important than ever that we in the United States understand Cuba and its economic system, not in the simplistic anti-communist terms of our mass media, but in some depth, through direct knowledge. Such understanding is crucial, for Cuba may well hold the key to the future of the Caribbean and Latin America.

The Center for Cuban Studies has planned this trip to give participants an introduction to Cuba and an explanation, in as much detail as possible in 15 days, of its socialist economy. You will have the unique opportunity of meeting some of Cuba's most perceptive economic planners in an informal and probing exchange.

Preliminary Program

SUNDAY, DECEMBER 27

Arrive at Jose Marti International Airport and transfer to Hotel Vedado for a cocktail party, informational meeting and dinner. Evening free to explore Havana on your own.

MONDAY, DECEMBER 28

Morning sightseeing of modern and colonial Havana by bus. Afternoon visit to the Literary Museum. Evening visit to "Casa de Cultura" in the municipal area of Revolution Square.

TUESDAY, DECEMBER 29

Morning meeting with Eugenio Rodriguez Balari, head of the Institute of Consumer Demand, and editor in chief of OPINA magazine. After lunch visit the Alamar Housing Community built by the system of microbrigades. Evening visit to a Committee for the Defense of the Revolution (CDR).

WEDNESDAY, DECEMBER 30

Morning visit to Los Naranjos, a citrus farming community; including visits to their day care center and polyclinic and a discussion with the director. Lunch at Rio Cristal. Afternoon discussion of rural community development. Evening optional cultural activity, such as a theater performance by the "Bertolt Brecht Political Theater Group."

THURSDAY, DECEMBER 31

Morning visit to the famed Havana Psychiatric Hospital. Afternoon visit to the Economic Institute. Evening New Year's Eve party.

FRIDAY, JANUARY 1

Depart by plane in the morning for Santiago de Cuba. Afternoon sightseeing. Evening at leisure for individual activities.

SATURDAY, JANUARY 2

Morning visit to the Jose Marti District, sight of new housing and facilities for 40,000 inhabitants. Afternoon visit to Siboney Farm where Fidel Castro and others planned the attack on Moncada, and to the old Moncada Garrison, now a museum and home of the July 26th Elementary School. Evening visit to the Casa de Trova for an evening of Cuban music.

SUNDAY, JANUARY 3

Journey through the beautiful Sierra Cristal mountains to Mayari Arriba. Once a remote village, Mayari has many new features which you will visit, including schools, a polyclinic and the museum of the Second Front. In the afternoon visit the Museum of the Underground, a fascinating documentary of the July 26th Movement in the cities. Evening optional dinner at the Santiago 1900, one of Cuba's best and loveliest restaurants.

MONDAY, JANUARY 4

Morning departure for Camaguey. Afternoon free to see the sights of the city. Evening see a performance of the Ballet de Camaguey, or visit the beautiful Casa de Trova to hear the Nueva Trova singers.

TUESDAY, JANUARY 5

Depart for Santa Clara, a pleasant combination of rural old-fashioned charm and new industry. Visit a tobacco factory and discuss the economics of the workplace with the employees.

WEDNESDAY, JANUARY 6

Depart for Varadero, the most spectacular beach in Cuba. Evening attend the Pirate's Cove nightclub.

THURSDAY, JANUARY 7

Day free at Varadero to enjoy swimming, bicycling, paddle boats or just relax in the sun. Evening visit to a CDR to discuss the economic life of the city.

FRIDAY, JANUARY 8

Morning departure for Havana. Afternoon meeting with members of JUCEPLAN, the agency responsible for economic planning in Cuba.

SATURDAY, JANUARY 9

Morning meeting with Poder Popular, the basic electorate unit in Cuba. Afternoon visit to Lenin Park and the Jose Marti Pioneer Camp for children. Evening farewell visit at a Cuban home.

SUNDAY, JANUARY 10

Morning free. Afternoon transfer to the airport for the return flight to Miami.

.....

COST

$900.00 from Miami, based on double occupancy. Single supplement—$140.00.

FEATURES

- Roundtrip airfare Miami/Havana; one way airfare Havana/Santiago
- Fourteen nights economy class hotel accommodations
- Three meals daily
- All services in program
- Services of an English speaking Cubatur guide and escorted by a Center for Cuban Studies guide
- Baggage handling
- U.S. Departure Tax and all visa fees

Deposit for the tour is $150.00 and should be sent by November 15 to:

Center for Cuban Studies
220 East 23rd Street
New York, NY 10010
(212) 685-9038

.....

Here is my $150.00. Sign me up for the Introduction to Cuba and its Socialist Economy tour.

Name .....

Address .....

.....

Phone .....

WEDNESDAY, NOVEMBER 26

Morning visit to a primary school. Afternoon meeting at the University of Havana and meeting with Ministry of Higher Education officials. Evening visit to "Casa de Cultura" to observe extra-curricular classes in theater, dance, music, etc.

THURSDAY, NOVEMBER 27

Morning visit to Cubanacan, the National Art School, to talk with professors and visit classes. Afternoon visit to teacher training school or school for day care center teachers. In the evening, a Thanksgiving celebration at the Cuban Institute for Friendship with the Peoples (ICAP) with musicians of the "nueva trova."

FRIDAY, NOVEMBER 28

Morning visit to the Havana Psychiatric Hospital. Afternoon visit to the famed Lenin School. Evening optional cultural activity such as attending a theater or dance performance.

SATURDAY, NOVEMBER 29

Morning discussion at the Institute for Internal Demand or a visit to the Alamar Housing Project outside of Havana. Afternoon at Santa Maria Beach and visit to Old Havana's "Plaza de Catedral" for the Saturday arts and crafts fair. Evening cultural activity or farewell party.

SUNDAY, NOVEMBER 30

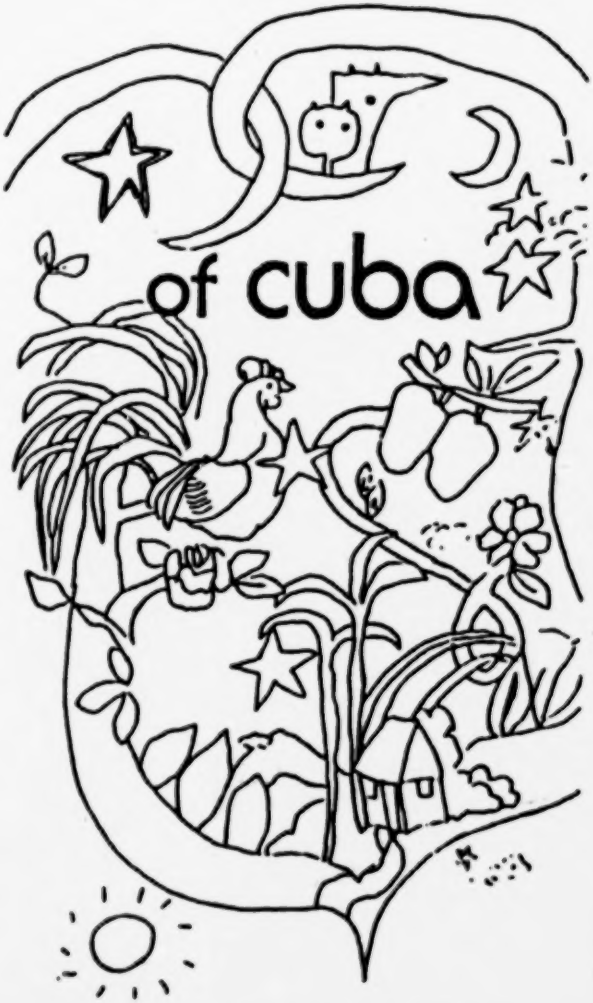
Departure.

EX. C

Center for Cuban Studies

Thanksgiving Tours

TWO TOURS: POLITICS and EDUCATION



Nov. 23-30, 1980

COST

The cost of each trip is $635, from Miami, based on double occupancy. Single supplement is $70. These trips are open only to Center for Cuban Studies members, and a member of the Center staff accompanies each group. If you are not currently a member, the $25 annual membership fee must accompany your $100 trip deposit.

FEATURES

- Round-trip air fare Miami - Havana
- Seven nights economy class hotel accommodations
- Three meals daily
- Services of English-speaking Cubatur guide
- Escorted by Center for Cuban Studies representative
- Baggage handling
- U.S. departure tax
- All visa fees

Deposit for

Deposit for the tour is $100 and should be sent by September 23 to:

Center for Cuban Studies
220 East 23rd Street
New York, New York 10010

for further information (212) 685-9038

Here is my $100 for the Politics or Education tour.
(circle one)
In addition, I enclose $25 for membership
(if applicable)

NAME _____
ADDRESS _____
_____
TELEPHONE _____

Center for Cuban Studies
220 East 23rd St., N.Y.C., N.Y. 10010

POLITICS TOUR

When Fidel Castro and the 26th of July Movement came to power in Cuba nearly 22 years ago, few outside of Cuba knew what to expect. We in the United States were remarkably ignorant of the lengthy revolutionary history of Cuba, for example, what the Cubans refer to as their "100 years of struggle."

In these 22 years, we have remained ignorant, to a considerable degree, of the political process which has made Cuba the only socialist state in the western hemisphere. The continuing U.S. economic blockade of Cuba and the fact that the U.S. broke diplomatic relations in 1961, are largely responsible for this lack of information.

Today, it is more important than ever that we in the United States understand Cuba and its political system, not in the simplistic anti-communist terms of our mass media, but in some depth, through direct knowledge. Such understanding is crucial, for Cuba may well hold the key to the future of the Caribbean, Central and Latin America.

The Center for Cuban Studies has planned this trip for its members in order to explain, in as much detail as possible in eight days, the workings of Cuba's domestic political system and its foreign policy. You will have the unique opportunity of meeting some of Cuba's most perceptive political people in an informal and probing exchange.

To insure maximum benefit for individual participants, the trips are limited in number. Therefore, you should indicate your interest as soon as possible. When you send in your deposit of $100 (plus $25 if you are not already a Center member), you will receive a copy of *The Complete Travel Guide to Cuba*, the *Cuban Constitution*, the *Family Code*, and other readings.

EDUCATION TOUR

SUNDAY, NOVEMBER 23
Arrive Havana late afternoon, meet with guides to discuss program. Evening, optional visit to Morro Castle Tavern.

MONDAY, NOVEMBER 24
Morning political/historical sightseeing tour of modern and colonial Havana, led by local historian. After lunch, political overview with Manuel Lee, head of the U.S. department of ICAP (the Cuban Institute for Friendship with People), then a visit to the Museum of the Revolution. Evening get-together in a private home with people who work in politics.

TUESDAY, NOVEMBER 25
Morning meeting at JUVENTUD REBELDE with editors and reporters of this Cuban afternoon daily newspaper. After lunch meet with representatives of "poder popular" (People's Power"). In the evening, attend a local CDR (Committee for Defense of the Revolution) meeting.

WEDNESDAY, NOVEMBER 26
Morning meeting with Eugenio Rodriguez Balari, head of the Institute for Internal Demand, and editor in chief of OPINA magazine. Afternoon meeting with Communist Party officials to discuss role of the Party. Evening visit to "Casa de Cultura" in the municipal area of Revolution Square.

THURSDAY, NOVEMBER 27
Morning visit to the Lenin School to talk with students about their political education. After lunch, a visit to Literacy Museum. In the evening, a Thanksgiving celebration at the ICAP house with musicians of the "nueva trova."

FRIDAY, NOVEMBER 28
Morning meeting with the Ministry of Foreign Relations to discuss Cuban foreign policy. After lunch, meet with representatives of the Federation of Cuban Women. In the evening, optional cultural activity, such as a theater performance by the "Bertolt Brecht Political Theater Group."

SATURDAY, NOVEMBER 29
Morning meeting with heads of departments of ICAP. Afternoon free, which could include a late afternoon/early evening visit to Old Havana's Cathedral Square for the Saturday arts and crafts fair. Evening farewell party or cultural event.

SUNDAY, NOVEMBER 30
Departure.

Cuba's educational system, which has received international recognition for everything from its 1961 literacy campaign to its work-study program and secondary schools in the countryside, cannot be understood in eight days. However, North American teachers face a peculiar dilemma: the Cuban school system runs more or less on the same calendar as our own. When U.S. educators are on vacation, and thus free to visit Cuba, Cuban schools are closed too.

The Center has therefore planned these eight days of Thanksgiving week very carefully; We have tried to put as much learning about Cuban schools as possible in such a short time, knowing that many teachers are taking valuable time from classrooms in order to better understand Cuban education.

We think that the following itinerary will give the average U.S. educator a good introductory overview to the Cuban system, the kind of introduction that will excite further interest and study. You will meet some of Cuba's finest educators in a relaxed and informal exchange, and visit schools of all types and all levels.

SUNDAY, NOVEMBER 23
Arrive Havana late afternoon; meet with guides to discuss program. Evening visit to Morro Castle Tavern.

MONDAY, NOVEMBER 24
Meeting with Ministry of Education officials in the morning and tour of the city. Afternoon visit to the Literacy Museum which houses teaching and study materials, statistics, etc. of the 1961 literacy campaign. Evening get-together with students and teachers in a private home.

TUESDAY, NOVEMBER 25
Morning visit to a secondary school in the countryside to observe work-study program. After lunch, visit to a Pioneer Camp. In the evening, meet with local CDR (Committee for Defense of the Revolution) to discuss neighborhood educational programs.

*Optional: visit the classrooms of the "nocturnal obrero campesino" where workers study after 5 p.m.

SUNDAY, DECEMBER 21:
See October 26.

MONDAY, DECEMBER 22:
See October 27.

TUESDAY, DECEMBER 23:
See October 28.

WEDNESDAY, DECEMBER 24:
See October 29.

THURSDAY, DECEMBER 25:
Early morning departure to SANTIAGO and tour of the city on arrival. Afternoon visit to a maternity hospital. Evening "Christmas" Party.

FRIDAY, DECEMBER 26:
See October 31.

SATURDAY, DECEMBER 27:
See November 1.

SUNDAY, DECEMBER 28:
See November 2.

MONDAY, DECEMBER 29:
See November 3.

TUESDAY, DECEMBER 30:
See November 4.

WEDNESDAY, DECEMBER 31:
Morning visit to the Camaguey School of Public Health or an old people's home, a day care center or the Pioneer Palace. In the afternoon, leave for SANTA CLARA, and check into Los Caneyes Hotel. Evening New Year's Eve Party.*

THURSDAY, JANUARY 1:
See November 6.

FRIDAY, JANUARY 2:
See November 7.

SATURDAY, JANUARY 3:
See November 8.

SUNDAY, JANUARY 4:
Departure.

*It is possible that because of New Year's activities, December 31 and January 1 will be spent at Varadero Beach.

Center for Cuban Studies

Health Care Tour of cuba

OCTOBER 26–NOVEMBER 9, 198

DECEMBER 21–JANUARY 4, 198

DEPOSIT FOR THE TOURS IS $100 AND SHOULD BE SENT BY SEPTEMBER 15 FOR THE OCTOBER TOUR, AND BY OCTOBER 21 FOR THE DECEMBER TOUR TO:

Center for Cuban Studies
220 East 23rd Street
New York, N.Y. 10010
(for further information: 212-685-9038)

Here is my $100 deposit for the Health Care Tour for (circle one) October December

plus $25 Center membership fee (if you are not already a member

Name_____

Address_____

_____

Telephone_____

When we receive your reservation form and deposit, we will send you a copy of THE COMPLETE TRAVEL GUIDE TO CUBA, and a number of readings on health care in Cuba.

HEALTH WORKERS TOUR

Health statistics are a matter of life and death. Cuba's health statistics give impressive evidence that the international recognition given Cuba's health system is well-deserved. For instance, Cuba has lowered its infant mortality rate to 19.3 per 1000 live births. Venezuela's is 43.7, Peru's 94.3, Haiti's 150.

The Center for Cuban Studies is sponsoring the two following tours for those interested in the fields of public health and medicine. The tours are intended as introductions to Cuba's health system. You'll have an opportunity to meet at length with nurses, doctors, Ministry of Public Health officials, patients, hospital administrators, and Cubans in several other fields as well.

COST

The cost of this 15-day trip is $929.00 from Miami, based on double occupancy. Single supplement $140.00.

FEATURES

- *Round-trip air fare Miami-Havana*
- *Fourteen nights economy class hotel accommodations*
- *Three meals daily*
- *One way air fare Havana - Santiago de Cuba*
- *All other transportation in Cuba*
- *Services of English speaking Cuban tour guide*
- *Center for Cuban Studies escort*
- *Baggage handling*
- *U.S. departure tax*
- *All visa fees*

PROGRAM

SUNDAY, OCTOBER 26
Arrive HAVANA late afternoon, meet with guides. Evening free.

MONDAY, OCTOBER 27
Morning tour of old and new Havana. Afternoon meeting with the Ministry of Public Health (MINSAP) for overview of Cuban health system. Evening meet informally in private home with Cuban health workers.

TUESDAY, OCTOBER 28
Morning visit to Psychiatric Hospital. Afternoon tour of the Literacy Museum and/or projection of films about health care at the Cuban Film Institute (ICAIC). Evening visit to Morro Castle Club for drinks and entertainment.

WEDNESDAY, OCTOBER 29
Morning visit to a community polyclinic. Afternoon visit to orthopedic hospital Frank Pais. Evening optional cultural or sports event.

THURSDAY, OCTOBER 30
Early morning departure to SANTIAGO and tour of the city on arrival. Afternoon visit to a maternity hospital. Evening free.

FRIDAY, OCTOBER 31
Morning excursion to Mayari Arriba in the SECOND FRONT, one hour into the mountains outside Santiago. Visit to and meeting at the polyclinic there and also at the maternity house. Lunch at El Sombrero restaurant in the mountains. Afternoon visit to the Psychiatric Hospital in El Cobre, meeting with the director, Alberto Orlandini. Evening at the Casa de la Trova, to hear the traditional troubadour songs.

SATURDAY, NOVEMBER 1
Visit Fort Moncada and the Museo de Clandestinidad (Museum of the Underground) in the morning. Afternoon free to explore Santiago. Evening cultural event.

SUNDAY, NOVEMBER 2
Depart by bus from Santiago to HOLGUIN. Spend day at the beach at GUARDALAVACA. Evening free.

MONDAY, NOVEMBER 3
Visit the hospital facilities at the large sugar central between Guardalavaca and Holguin in the morning. Lunch at MAYABE. In the afternoon visit the Lenin Hospital in HOLGUIN. Evening free.

TUESDAY, NOVEMBER 4
Depart for CAMAGUEY, and have lunch there. Tour Camaguey in the afternoon and visit a factory. In the evening, visit Casa de la Trova for another kind of troubador singing.

WEDNESDAY, NOVEMBER 5
Morning visit to the Camaguey School of Public Health or an old people's home, a day care center or the Pioneer Palace. In the afternoon, leave for SANTA CLARA, and check into Los Caneyes Hotel. Evening free.

THURSDAY, NOVEMBER 6
Morning visit to La YaYa community to talk with community leaders about health issues and programs. In the afternoon, leave for HAVANA. Evening free or cultural event.

FRIDAY, NOVEMBER 7
Morning meeting with MINSAP about health education. Afternoon visit to the Lenin School or to the new communities of Jibacoa or Los Naranjos. Evening cultural event.

SATURDAY, NOVEMBER 8
Morning meeting with Cuban health personnel and the Federation of Cuban Women about sex education. Afternoon free or at the beach at Santa Maria. Evening cultural event.

SUNDAY, NOVEMBER 9
Departure.

EXHIBIT E

CENTER FOR CUBAN STUDIES
220 East 23rd Street, New York, N.Y. 10010
(212) 685-9038

April 28, 1982

Dear Study Tour Member,

We assume you have heard about recent Treasury Department regulations which ban ordinary tourist and business travel to Cuba as of May 15. The regulations permit by general license official travel, visits to close relatives, and travel connected with research, newsgathering or similar activities.

So that we may comply with the regulations, we are currently examining them in detail along with our attorneys.

We will be in touch with you again within the next 15 days to let you know the status of the situation, and we hope you will bear with us until then.

We greatly appreciate your interest in this trip, and especially we appreciate your patience and good will.

Very sincerely,

/s/ Sandra Levinson
SANDRA LEVINSON
Director

Center for Cuban Studies

Dear Study Tour Member,

As you will recall, our summer study tour of Cuba includes seminars and discussions of aspects of Cuban society. We are writing now to better determine your specific interests and areas of expertise. Therefore, would you kindly fill in the blank below and return it to us as soon as possible.

I would like to attend research seminars in the following general areas:

___Political Science

___Economics

___Medicine and Health Care

___Education

___Culture

___Other (Be as specific as possible)

I would be willing to give a seminar in the following specific study areas: (Your work need not be Cuba related.)

___Political Science, in following specialty _____

___Economics, in following specialty _____

___Health, in following specialty _____

___Education, in following specialty _____

___Culture, in following specialty _____

___Other

Please list your publications or works in progress in this specialty.

_____

_____

Please advise what, if any, special equipment or materials would be needed for your seminar (slide projector, etc.) if this equipment must be provided in Cuba

220 East 23rd Street, New York, N.Y. 10010 (212) 685-9038

Center for Cuban Studies

Dear Study Tour Member,

As you will recall, our summer study tour of Cuba includes seminars and discussions of aspects of Cuban society. We are writing now to better determine your specific interests and areas of expertise. Therefore, would you kindly fill in the blank below and return it to us as soon as possible.

I would like to attend research seminars in the following general areas:

___Political Science

___Economics

✓ Medicine and Health Care

___Education

___Culture

___Other (Be as specific as possible)

I would be willing to give a seminar in the following specific study areas: (Your work need not be Cuba related.)

___Political Science, in following specialty _____

___Economics, in following specialty _____

___Health, in following specialty _____

___Education, in following specialty _____

___Culture, in following specialty _____

___Other

Please list your publications or works in progress in this specialty.

_____

_____

Please advise what, if any, special equipment or materials would be needed for your seminar (slide projector, etc.) if this equipment must be provided in Cuba.

EX. F-1

220 East 23rd Street, New York, N.Y. 10010 (212) 685-9035

Center for Cuban Studies

Dear Study Tour Member,

As you will recall, our summer study tour of Cuba includes seminars and discussions of aspects of Cuban society. We are writing now to better determine your specific interests and areas of expertise. Therefore, would you kindly fill in the blank below and return it to us as soon as possible.

I would like to attend research seminars in the following general areas:

✓ Political Science

✓ Economics

___ Medicine and Health Care

✓ Education

___ Culture

✓ Other (Be as specific as possible) Housing

I would be willing to give a seminar in the following specific study areas: (Your work need not be Cuba related.)

___ Political Science, in following specialty _____

___ Economics, in following specialty _____

___ Health, in following specialty _____

___ Education, in following specialty _____

___ Culture, in following specialty _____

___ Other

Please list your publications or works in progress in this specialty.

_____

_____

Please advise what, if any, special equipment or materials would be needed for your seminar (slide projector, etc.) if this equipment must be provided in Cuba.

Jane Wood

T.X.F.

220 East 23rd Street, New York, N.Y. 10010 (212) 685-9038

Center for Cuban Studies

Dear Study Tour Member,

As you will recall, our summer study tour of Cuba includes seminars and discussions of aspects of Cuban society. We are writing now to better determine your specific interests and areas of expertise. Therefore, would you kindly fill in the blank below and return it to us as soon as possible.

I would like to attend research seminars in the following general areas:

✓ Political Science

___ Economics

___ Medicine and Health Care

___ Education

___ Culture

✓ Other (Be as specific as possible)

Rehabil. Latyon & / Special Ed for Developmentally & Physically Handicapped Children

I would be willing to give a seminar in the following specific study areas: (Your work need not be Cuba related.)

___ Political Science, in following specialty _____

___ Economics, in following specialty See above

___ Health, in following specialty

___ Education, in following specialty

Field work done in Cuba on Comparative Analysis of US + Cuban State Policy & Implementation

___ Culture, in following specialty _____

___ Other

Please list your publications or works in progress in this specialty.

See Attached

Please advise what, if any, special equipment or materials would be needed for your seminar (slide projector, etc.) if this equipment must be provided in Cuba.

EK. F.3

200 East 33rd Street, New York, N.Y. 10010 (212) 555-8026

Publications and Films

1981	Published Proceedings, 8th International Congress of Occupational Therapists, Hamburg Germany. "Occupational Treatment Patterns within Different Cultural Structures"
1978	The American Journal of Occupational Therapy, "There Had to be a Better Way", Vol. 32, No. 3
1978	Published Proceedings, World Federation of Occupational Therapists, Seventh International Congress, Jerusalem, Israel, "An Interdisciplinary Research, Development and Testing Enterprise"
1976	Published Proceedings, Conference on Systems and Devices for the Disabled, The Biomedical Engineering Center and the Rehabilitation Institute of Tufts New England Center "Bridging the Humanistic-Mechanistic Gap: Creative Technological Aids"
1975	The American Journal of Occupational Therapy, "Creative Technological Aids for the Learning Disabled Child: An Interdisciplinary Project", Vol. 29, No. 2
1972	Film, "The Many Sides of David" (38 minutes, 16mm), documentary of interdisciplinary diagnostic of learning disabilities.
1973	The American Journal of Occupational Therapy, "Programmed Instruction versus Therapist Instruction", Vol. 26, No. 2
Spring 1971	M.O.T.A. Quarterly, "Kennedy Evaluation Procedure" and "I.B.M. Executory Program"

MARY C DRISCOLL
17 FAIRMONT AVE
Cambridge MASS
02139

Center for Cuban Studies

Name: Philip Brenner

Dear Study Tour Member,

As you will recall, our summer study tour of Cuba includes seminars and discussions of aspects of Cuban society. We are writing now to better determine your specific interests and areas of expertise. Therefore, would you kindly fill in the blank below and return it to us as soon as possible.

I would like to attend research seminars in the following general areas:

___Political Science

___Economics

___Medicine and Health Care

✓ Education

___Culture

✓ Other (Be as specific as possible) Foreign Policy

I would be willing to give a seminar in the following specific study areas: (Your work need not be Cuba related.)

✓ Political Science, in following specialty U.S. Congress, U.S. Foreign Policy in Latin America

___Economics, in following specialty _____

___Health, in following specialty _____

___Education, in following specialty _____

___Culture, in following specialty _____

___Other

Please list your publications or works in progress in this specialty.

Limits and Possibilities: Studies on the Congress (St. Martin's Press, 1982) - includes chapter on U.S.-Cuban relations

Please advise what, if any, special equipment or materials would be needed for your seminar (slide projector, etc.) if this equipment must be provided in Cuba.

In progress: Congress and President: Studies on American National Government

EX. F:4

220 East 23rd Street, New York, N.Y. 10010 (212) 685-9036

Center for Cuban Studies

Dear Study Tour Member,

As you will recall, our summer study tour of Cuba includes seminars and discussions of aspects of Cuban society. We are writing now to better determine your specific interests and areas of expertise. Therefore, would you kindly fill in the blank below and return it to us as soon as possible.

I would like to attend research seminars in the following general areas:

X Political Science
X Economics → Political Economy (Marxist)

___Medicine and Health Care

___Education

___Culture

___Other (Be as specific as possible)

I would be willing to give a seminar in the following specific study areas: (Your work need not be Cuba related.)

___Political Science, in following specialty _____

X Economics, in following specialty Emergent Economies as Colonial Phenomena the relationship between Capitalist Ideology and the teaching of economics in the U.S.

___Health, in following specialty _____

___Education, in following specialty _____

___Culture, in following specialty _____

X Other I would be glad to do one slide show each on Nicaragua and Grenada.

Please list your publications or works in progress in this specialty.

"Comentario a la Introducción de 'La Sutil Ideología del Capitalismo'", por David L. Schweickart, en Textual, Revista de Humanidades y Ciencias Sociales de La Universidad Autónoma Chapingo, México, abril-junio, 1982, pp.

Please advise what, if any, special equipment or materials would be needed for your seminar (slide projector, etc.) if this equipment must be provided in Cuba.

Slide projector and tape player (cassette).

EX. F.5

David L. Schweickart
5/3/82

220 East 23rd Street, New York, N.Y. 10010 (212) 685-3038

Center for Cuban Studies

Dear Study Tour Member,

As you will recall, our summer study tour of Cuba includes seminars and discussions of aspects of Cuban society. We are writing now to better determine your specific interests and areas of expertise. Therefore, would you kindly fill in the blank below and return it to us as soon as possible.

I would like to attend research seminars in the following general areas:

___Political Science

✓Economics

✓Medicine and Health Care

___Education

✓Culture

✓Other (Be as specific as possible) Development of agriculture

If possible I would like to meet with anthropologists and other social scientists working on third World socio-economic development.

I would be willing to give a seminar in the following specific study areas: (Your work need not be Cuba related.)

___Political Science, in following specialty _____

___Economics, in following specialty _____

___Health, in following specialty _____

___Education, in following specialty _____

___Culture, in following specialty _____

✓Other Migratory agricultural labor from Mexico to the U.S. and the effects on the Mexican economy

Please list your publications or works in progress in this specialty

"Causes and effects of agricultural labor migration from Mexico to the United States of Bracero to California"

Please advise what, if any, special equipment or materials would be needed for your seminar (slide projector, etc.) if this equipment must be provided in Cuba

35 mm. slide projector.

EX. F.6

220 East 23rd Street, New York, N.Y. 10010 (212) 685-0035

Center for Cuban Studies

Dear Study Tour Member, Peter RANIS

As you will recall, our summer study tour of Cuba includes seminars and discussions of aspects of Cuban society. We are writing now to better determine your specific interests and areas of expertise. Therefore, would you kindly fill in the blank below and return it to us as soon as possible.

I would like to attend research seminars in the following general areas:

- ✓ Political Science*
- ✓ Economics
- ___ Medicine and Health Care
- ___ Education
- ✓ Culture
- ✓ Other (Be as specific as possible) Labor*; Cuban Foreign Policy in L.A.

I would be willing to give a seminar in the following specific study areas: (Your work need not be Cuba related.)

- ✓ Political Science, in following specialty Puerto Rican Politics
- ___ Economics, in following specialty _____
- ___ Health, in following specialty _____
- ___ Education, in following specialty _____
- ___ Culture, in following specialty _____
- ___ Other

Please list your publications or works in progress in this specialty.

✓ Puerto Rico: Seven Decades of Americanization" Fall, 1980 Latin American Research Review (Review article)

Please advise what, if any, special equipment or materials would be needed for your seminar (slide projector, etc.) if this equipment must be provided in Cuba.

EX. F-7

Center for Cuban Studies

Dear Study Tour Member,

As you will recall, our summer study tour of Cuba includes seminars and discussions of aspects of Cuban society. We are writing now to better determine your specific interests and areas of expertise. Therefore, would you kindly fill in the blank below and return it to us as soon as possible.

I would like to attend research seminars in the following general areas:

XX Political Science

XX Economics

___Medicine and Health Care

___Education

XX Culture

___Other (Be as specific as possible)

I would be willing to give a seminar in the following specific study areas: (Your work need not be Cuba related.)

___Political Science, in following specialty _____

___Economics, in following specialty _____

___Health, in following specialty _____

___Education, in following specialty _____

XX Culture, in following specialty 20th century cultural nationalism in Latin America

XX Other Afrocubans in the 1920s

Please list your publications or works in progress in this specialty.

Ph.D. dissertation, "The Displaced and the Disappointed: Black Activists and Cultural Nationalists in Cuba in the 1920s."

Please advise what, if any, special equipment or materials would be needed for your seminar (slide projector, etc.) if this equipment must be provided in Cuba.

Rosalie Schwartz
Department of History
San Diego State University
San Diego, Ca 92182 (714) 265-4254
or 4161 Olympic St
San Diego, CA 92115 (714) 582-4462

EX. F-g

Center for Cuban Studies

Dear Study Tour Member,

As you will recall, our summer study tour of ... includes seminars and discussions of aspects of Cuban society. We are writing now to better determine your specific interests and areas of expertise. Therefore, would you kindly fill in the blank below and return it to us as soon as possible.

I would like to attend research seminars in the following general areas:

____Political Science

__X__Economics

____Medicine and Health Care

____Education

__X__Culture

____Other (Be as specific as possible) History of Cuba - my own specialty is economic history, late 19th, early 20th centuries

I would be willing to give a seminar in the following specific study areas: (Your work need not be Cuba related.)

____Political Science, in following specialty _____

____Economics, in following specialty _____

____Health, in following specialty _____

____Education, in following specialty _____

____Culture, in following specialty _____

____Other History - In April I gave a paper at the Conference of Caribbean Historians, in San Juan, on "Early U.S. investment in Puerto Rican sugar." That might be relevant for a seminar. I am also beginning a parallel research project in U.S. archives on ... in Cuba, c. 1900.

Please list your publications or works in progress in this specialty.

Please advise what, if any, special equipment or materials would be needed for your seminar (slide projector, etc.) if this equipment must be provided in Cuba.

None - but I could bring along copies of my paper.

EX. F-9

Muriel Nelson Weisman
[illegible] South Main St.
Concord, N.H., 03301

I'm a professor of History at Fitchburg State College, Fitchburg, Mass. My doctoral dissertation at Boston University dealt in part with trade between Boston and Cuba before the U.S. Civil War.

EXHIBIT G

CENTER FOR CUBAN STUDIES
220 East 23rd Street, New York, N.Y. 10010
(212) 685-9038

June 1, 1982

Dennis M. O'Connell
Foreign Assets Control Office
1331 G Street N.W.
Washington, D.C. 20220

Dear Mr. O'Connell:

The Center for Cuban Studies has scheduled a summer interdisciplinary study tour to Cuba, to extend from July 16 to August 15. The tour is intended for professionals—academics, writers and journalists, legal and health personnel, and others—for whom the Spanish language and an in-depth knowledge of Cuba is important, even necessary, to their work.

The program is organized to teach both Cuban Spanish and various aspects of Cuban culture, society, history, economics and politics to those enrolled in the summer course. The participants will live and study together for one month in Havana. Morning classes will be given in Spanish at three levels—beginning, intermediate and advanced—with an emphasis on Cuban literature in the advanced classes. These classes will be given five days during the week, i.e., the weekdays. Afternoon seminars will be given in the area of specialization of each tour participant, together with field trips. For this purpose, the people who are part of this interdisciplinary study tour are being divided into seven areas of specialization. They are:

1. Cuban Culture—film, music, dance, art, literature

2. Cuban Education—day care and primary schools, secondary schools, university education, worker-peasant schools, and special education for handicapped and disabled
3. Cuban Science, Medicine, Health Care—physical and mental health care, preventive programs, environmental concerns, scientific ad research advances
4. Cuban Economics and Politics—organization of the Cuban economy, political structure (both Party and administrative), mass organizations
5. Cuban Social Relations—women, race, housing, the elderly, the family
6. Cuban Law—all aspects of the criminal justice system, including the courts, the Constitution, prisons, delinquency
7. Cuban History and Foreign Policy for Latin Americanists

These afternoon seminars will be given by experts in the different fields and visits will be made to relevant institutions. For example, in the cultural field, seminars will be given by writers Roberto Fernández Retamar and Cintio Vitier, filmmakers Tomas Gutiérrez Alea and Santiago Alvarez, composers Leo Brouwer and Harold Gramatges, artists Raúl Martinez and Mariano Rodriguez, art critic Adelaida de Juan, actor-directors Mario Balmaseda and Raquel Revuelta. Field trips will be made to Cubanacan, the art school in Havana; the Cuban National Ballet, both in rehearsal and in performance; the Cuban Film Institute to see films and talk with directors and actors; the theater companies, again both in rehearsal and in performance, and to the Cuban Writers and Artists Union.

The Center received over 300 applications for this study tour and we have specifically selected those persons whom

this tour and these classes would help in their work. We excluded those who seemed to be applying only as "tourists," because the Center is intended to aid persons in their desire to deepen their knowledge and understanding of Cuba, and not to serve as a travel agent for tourists.

I have attached a list of those persons selected for the study tour and the subject area in which each will take seminars and will, in many instances, offer seminars. We have asked each participant to give at least one seminar in his or her area of specialization, as a way of sharing knowledge with Cubans in the same fields. Unless otherwise noted, all those connected with a university are either professors or are completing postgraduate studies.

While we believe that this study tour falls within the limits defined for a general license in Section 515.560(ii) of the Cuban Assets Control Regulations, i.e., "persons who are traveling for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities," should the Office of Foreign Assets Control consider that this Center study tour does *not* fall under the General License requirements, I would like you to consider this letter a request for a Specific License.

Because of the time element, we are most concerned to obtain a ruling from you as quickly as possible. When I spoke with Mr. Boudreau, he assured me that our application would be dealt with as expeditiously as possible. I look forward to hearing from you soon, and will call to make an appointment to discuss the tour with you.

Thank you very much.

/s/ Sandra Levinson
SANDRA LEVINSON
Executive Director

Enclosure: List of Tour Participants

cc: To each tour participant
Michael Standard, Esq.

LIST OF PARTICIPANTS ACCORDING TO MAJOR SUBJECT AREA

I. CUBAN CULTURE

1. Robert Achs, filmmaker, New York City
2. Eugene Adams, media specialist
3. Basha Alperin, musician, New York City
4. Suzanne Avellano, Dept. of Art History, Univ. of Calif./Santa Barbara
5. Ronald Balistrieri, Dept. of Comparative Literature, UC/Riverside
6. Susan Fanshel, filmmaker, New York City
7. Dr. Bruce Franklin, Dept. of English, Rutgers Univ., New Jersey
8. Lisa Frigand, grantmaking in the arts field, New York City
9. Roger Larson, filmmaker, New York City
10. Barbara Leckie, graphic designer, Washington, D.C.
11. Jacqueline Leopold, film producer, New York City
12. Dr. Jack Mitchell, Dept. of English, San Bernardino Valley College, San Bernardino, Calif.
13. Dr. Patty Lee Parmalee, writer, New York City
14. Judith Sobel, film editor, New York City

II. CUBAN EDUCATION

1. Paul Baizerman, teacher, P.S. 309K, New York City
2. Beverly Bickel, teacher-counselor for high school dropouts, La Alianza Hispana, Boston, Mass.

3. Jan Calloway, teacher of English as a second language, New York City Public High School
4. Miriam Carter, instruction assistant for learning disabled children, Roxbury Community College, Roxbury, Mass.
5. Jennifer Charnovsky, bilingual kindergarten teacher, Los Angeles Unified School District
6. Kimberly Gerould, teacher of English as a second language, Somerville, Mass.
7. Susan R. Greenberg, bilingual education counselor, instructor to disabled children, Charles River Academy, Cambridge, Mass.
8. Dr. Cecilia Pollack, director, Intersensory Learning Center, Great Neck, N.Y.
9. Janice Rank, instructor in reading, English, psychology, San Bernardino, Calif.
10. Stephen Shapiro, Principal and social studies teacher, Satellite Academy High School, New York City
11. Eddison Skerrit, teacher, New York City public schools
12. Cheryl Sonnichsen, Dept. of International Development Education, Stanford University, Stanford, Calif.
13. Brad Stocker, teacher of English as a second language, Miami-Dade Community College, Florida
14. David Tanzer, Dept. of Mathematics, Univ. of Penna. (student)
15. Cynthia Terrell, Germantown Friends School (student, daughter of Huntington Terrell)

16. David K. Truscello, teacher of English, as a second language, Roxbury Community College, Roxbury, Mass.
17. Claudia Zaslavsky, mathematician, author, Teachers College consultant, New York City
18. Sam Zaslavsky, professor at Baruch College, New York City (ret.)
19. Clarence E. Wilkins, Upper School, Abington Friends School, Jenkintown, PA

III. CUBAN SCIENCE, MEDICINE, HEALTH CARE

1. Michael Carter, senior programmer, Univ. of Calif./Davis, Dept. of Agronomy and Range Science
2. Mary Driscoll, Director, Occupational Therapy Dept., Kennedy Memorial Hospital for Children, Boston, MA
3. Patricia Ferrand, County Solid Waste Coordinator, New Jersey
4. Dr. John Gliedman, Dept. of Psychology and Philosophy of Science, Empire State College, New York City
5. Deborah Howland, R.N., Boston City Hospital
6. Brenda Loew, Director of Community Energy Planning, Amherst, MA
7. Judith-Powell, R.N., New York Infirmary, Downtown Beekman Hospital, New York City
8. Dr. Charles Roberts, psychiatrist, private practice, New Jersey
9. Dr. Charles Rosenbloom, psychiatrist, Morningside Clinic and private practice, New York City
10. Dr. Charles Wright, obstetrician, private practice, Detroit, MI

11. Mrs. Charles Wright
12. Lindsay Gillies, Data Base Administrator, Univ. of Mass./Amherst

IV. CUBAN ECONOMICS AND POLITICS

1. Dr. Philip Brenner, Dept. of Political Science, American University, Washington, D.C.
2. Dr. Michael Kearney, Dept. of Anthropology, teacher of Third World socio-economic development, UC/Riverside
3. Rosemary Potter, Dept. of Political Science, University of Wisconsin/Milwaukee
4. Kathleen Pritchard, Dept. of Political Science, Univ. of Wis./Mi.
5. Carlotta Renwick, accountant, C.E.S. Publishing Corp., New York
6. Dr. David Schwartz, Dept. of Economics, Albright College, Albright, PA
7. Dr. Thomas A. Sears, Dept. of Economics, Univ. of San Francisco
8. Dr. Huntington Terrell, Dept. of Philosophy, Colgate University, Hamilton, New York
9. Millie Thayer, teacher of social studies, Grant High School, Portland, Oregon
10. Penny Rubinfine, Center for Cuban Studies, New York City

V. CUBAN SOCIAL RELATIONS

1. Arthur Bassin, architect and urban planner, University of California/Santa Barbara
2. Gilbert Cadena, Dept. of Sociology, Univ. of Calif./Riverside

3. Lucille Flato, City of San Francisco Social Services Department
4. James Flory, Dept. of Sociology, Inver Hills Community College, St. Paul, MN
5. Jennifer Green, Dept. of Anthropology, Stanford Univ., CA
6. Michael Hirsch, Dept. of Sociology, Univ. of Wisconsin/Milwaukee
7. Monika Lynne Hudson, public administrator, Sacramento, CA
8. Carole Nagengast, Dept. of Anthropology, UC/Riverside
9. Arline Prigoff, Jane Addams College of Social Work, Chicago, and Coordinator, West Side Chicago Parental Stress Services
10. Laurie Puretz, UC/Santa Cruz (student)
11. Ernestine S. Roye, social worker, Spence-Chapin Services to Families and Children, New York City
12. Dr. James Otis Smith, Dept. of Sociology, Univ. of Wis./Milwaukee
13. Jane Wood, housing and tenants organizer, New York City
14. Dwayne Wyatt, UCLA Graduate School of Architecture and Urban Planning

VI. CUBAN LAW

1. Emily Bass, Esq., Rabinowitz, Boudin, Standard, Krinsky & Lieberman, New York City
2. Haywood Burns, Esq., Director, Urban and Legal Studies, City College of New York

3. Maggie Cohn, National Jury Project Staff, Boston
4. Ethel Devine, court reporter, Brooklyn, N.Y.
5. Peter Joy, Esq., Clinical Legal Education Program, Case Western Reserve University School of Law, Cleveland
6. Emilie Nora Junge, Esq., U.S. Dept. of Labor
7. The Rev. David Patton, juvenile delinquency prevention program and social justice programs, California
8. Scott D. Pollack, legal assistant, New York City
9. Margarita Rosa, Esq., Rabinowitz, Boudin, Standard, Krinsky & Lieberman, New York City

VII. CUBAN HISTORY AND FOREIGN POLICY FOR LATIN AMERICANISTS

1. June Belkin, Center for Latin American Studies, Univ. of Pittsburgh
2. William Bigelow, Social Studies, Jefferson High School, Portland, Oregon
3. Shirley Braus, Latin American Studies, California State Univ., Los Angeles
4. Dr. Betty Broadhurst, Latin American Studies, Colorado State University
5. Edward P. Casey, Latin American History, Leeward Community College, Pearl City, Hawaii
6. Audrey Cole, administrative assistant, Senator Lowell Weicker
7. Jackie Dooley, Bibliographer/Editorial Assistant, Hispanic American Periodical Index, Latin American Center, UCLA

8. Jane Franklin, Center for Cuban Studies/*Cuba in Focus*, NYC
9. Naomi Friedman, Center for Cuban Studies, New York City
10. Dr. William Gaboury, Dept. of History, Southern Oregon State College, Ashland, Oregon
11. Susan L. Gregory, *Latin American Perspectives*, UC/Riverside
12. Dr. Muriel McAvoy-Weissman, Latin American History, Fitchburg State College, Mass.
13. Dr. Peter Ranis, Dept. of Political Science and History, York College, CUNY, New York City
14. Dr. Margarita Samad-Matias, Director, Latin American Studies Program, City College, New York City
15. Dr. Rosalie Schwartz, Latin American History, San Diego State University

The following participants are journalists, but each of them would also fit into the category assigned for those in the cultural field:

1. Margot Adler, National Public Radio/Neiman Fellow (Harvard)
2. Barbara Leon, writer-reporter
3. Norma Smith, radio producer, Pacifica Radio, Calif.
4. Martha W. Tabor, writer-photographer, Washington, D.C.
5. Robert Weil

OFFICE OF THE SECRETARY OF THE TREASURY
Washington, D.C. 20220

[SEAL]

FAC NO. 96248

Jun 11, 1982

Dear Ms. Levinson:

This is in response to your letter of June 1, 1982, concerning the Center for Cuban Studies' proposed interdisciplinary study tour in Cuba from July 16-August 15, 1982.

As you are aware, this Office administers the Cuban Assets Control Regulations, which prohibit all unlicensed economic transactions in which Cuba has an interest. Section 515.560 of the Regulations sets forth a licensing policy which authorizes certain transactions on behalf of certain persons who wish to travel to Cuba. Persons subject to U.S. jurisdiction who are traveling to visit close relatives in Cuba, to engage in professional research in Cuba, for purposes of certain news-related or film-making activities in Cuba, or to engage in official business may visit Cuba without obtaining a specific Treasury license. All other persons who wish to travel to Cuba must obtain a specific Treasury license in advance. Under current licensing policy, only those persons with compelling humanitarian reasons or who are to participate in public performances or exhibitions may receive a specific Treasury license.

We have considered the proposed study tour of the Center for Cuban Studies under both the general and the specific license authorizations. General interest study tours, even when the prospective participants are professionals in various fields, do not constitute "engaging in professional research" or "gathering news, making news or documentary films" under section 515.560. Moreover, although prospective participants may regard the tour as educational and informative, such generalized benefits are

not sufficient to bring the trip within the specific licensing authority for exceptions based on humanitarian grounds. Finally, we have received no information suggesting that the second category for which specific licenses may be granted, that pertaining to public performances and public exhibitions, is involved here.

Based upon information presented in your June 1 letter, it is the determination of this Office that the proposed interdisciplinary study tour does not fall within any of the general license categories. It is also our determination that issuance of a specific license would not be appropriate in this case. Approval of travel-related transactions involving travel for such general purposes would be inconsistent with section 515.560's purpose of limiting Cuba's foreign exchange earnings.

As you were informed by Marilyn L. Muench, Chief of Licensing, in her conversation with you June 4, it is possible that certain of the prospective tour participants individually are eligible to engage in travel-related transactions under the general license or a specific license. We would be pleased to consider any additional information which may be presented to this Office pertaining to such individuals.

I regret any inconvenience this new control may cause and trust this information will be helpful to you.

Very truly yours,

/s/ Dennis M. O'Connell
DENNIS M. O'CONNELL
Director
Office of Foreign Assets Control

Ms. Sandra Levinson
Center for Cuban Studies
220 East 23rd St.
New York, New York 10010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No.

RUTH WALD, ET AL., PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

AFFIDAVIT IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

COMMONWEALTH OF MASSACHUSETTS)

COUNTY OF MIDDLESEX)

RUTH WALD, being duly sworn, deposes and says:

1. I am a citizen of the United States and reside at 21 Lakeview Avenue, Cambridge, Massachusetts. I am a Professor of Biology at the Biological Laboratories of Harvard University.

2. I wish to visit Cuba for approximately ten (10) days commencing on or about August 15, 1982. My trip to Cuba cannot be delayed beyond this date since my duties at Harvard University require my presence in Cambridge beginning in early September. Thus, I if I am unable to visit Cuba in August, I will not be able to make the trip for the foreseeable future.

3. The purpose of my intended visit to Cuba is to meet and make contact with Cuban women, to renew friendships with Cuban women whom I met on my previous trip, and to explore how women in Cuba are resolving problems which confront working women everywhere.

4. I am not going to Cuba to gather news, engage in professional research, to visit relatives, to give public performances or for humanitarian purposes.

5. It is my understanding that, given the purposes of my visit, I am not entitled, under the recently enacted regulations governing travel to Cuba (32 C.F.R. 515.560, as amended April 20, 1982), to receive either a general or specific license to travel to Cuba and that these regulations prohibit my travelling to Cuba entirely.

Sworn to under the pains and penalties of perjury, this 7th day of June, 1982.

/s/ Ruth Wald
RUTH WALD

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF BARNSTABLE June 7, 1982

Then personally appeared before me the above-named RUTH WALD and made oath that she has read the foregoing Affidavit and that the contents thereof are true.

/s/ Ruth B. Campbell
Notary Public
My Commission Expires: June 24, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No.

RUTH WALD, ET AL., PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

AFFIDAVIT IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

COMMONWEALTH OF MASSACHUSETTS)

COUNTY OF MIDDLESEX)

MARIAN LOWE, being duly sworn, deposes and says:

1. I am a citizen of the United States and reside at 10 Arnold Circle, Cambridge, Massachusetts. I am an Associate Professor of Chemistry at Boston University.

2. I wish to visit Cuba for at least ten (10) days commencing on or about August 15, 1982. I cannot postpone my trip to Cuba since my academic duties at Boston University commence early in September. If I am not able to visit Cuba this August, I will not be able to visit that country in the foreseeable future.

3. I have visited several countries in Latin America and, I am interested in visiting Cuba since I am curious about the country. I am particularly interested in learning how the role of women has changed in Cuba since 1969.

4. I am not going to Cuba to gather news, engage in professional research, to visit relatives, to give public performances, or for humanitarian purposes.

5. It is my understanding that, given the purposes of my visit, I am not entitled, under the recently enacted regulations governing travel to Cuba (32 C.F.R. 515.560, as amended April 20, 1982), to receive either a general or specific license to travel to Cuba and that these regulations prohibit my travelling to Cuba entirely.

Sworn to under the pains and penalties of perjury, this 8th day of June, 1982.

/s/ Marian Lowe
MARIAN LOWE

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. June 8, 1982

Then personally appeared before me the above-named MARIAN LOWE and made oath that she has read the foregoing Affidavit and that the contents thereof are true.

/s/ Duran Bauman

My Commission Expires: Nov. 12, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RUTH WALD, ET AL., PLAINTIFFS

—against—

DONALD REGAN, ET AL., DEFENDANTS

AFFIRMATION

COMMONWEALTH OF MASSACHUSETTS)
) ss.:
COUNTY OF MIDDLESEX)

I, Rev. Alice Hageman, being of full age, declare and affirm:

1. I reside at 37 Boylston Street, Jamaica Plain, Massachusetts 02130.

2. I am co-Pastor of the Church of the Covenant (United Church of Christ and United Presbyterian Church, USD), Boston, Massachusetts.

3. I have visited Cuba on several occasions and have been invited by the Women's Department of the Cuban Ecumenical Council to visit Cuban for two weeks in August of 1982. All of my expenses for this trip would be paid for by residents of Cuba and in Cuban currency. I am in substantial doubt due to the vagueness of recently enacted travel regulations affecting travel to Cuba as to whether I may be prosecuted for violation of the Trading with the Enemy Act even though my travel will result in no financial benefit to Cuba.

4. I am also actively engaged in planning a trip of lay people and clergy to study religion in Cuba in 1983. As a result of the recently enacted travel regulations I have substantial doubts as to whether such a trip is permitted.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 8, 1982.

/s/ Alice J. Hageman

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No.

RUTH WALD, ET AL., PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

AFFIDAVIT

STATE OF ILLINOIS
COUNTY OF COOK

I, LINDA TURNER, being of full age, declare and affirm as follows:

1. I am a citizen of the United States and a resident of the City of Chicago, State of Illinois.
2. I am employed as a secretary, which is my occupation.
3. I have been interested in Cuban society for many years, and in fact have visited that country four times in the past 12 years.
4. I am concerned that Americans learn about the reality of Cuban society, and to that end I take photographs and slides during my visits, in order to make presentations to groups of Americans about life in Cuba.
5. I am interested in approaching Jewish synagogues in the Chicago area, to interest them in having educational programs on Cuba. To better conduct an educational presentation on Cuba and in particular the Jewish community in Cuba, I need first-hand information gained through interviews and discussions with Cuban Jews.

6. I had plans to visit Cuba this winter. One of my particular interests was to speak with the leaders of the Jewish community in Havana, particularly the Librarian of the main synagogue there with whom I am acquainted, in order to obtain up-to-date information.

7. I feel that my right to travel to Cuba is guaranteed to me under the United States Constitution, and that any restriction on my right to travel is therefore unconstitutional.

8. I understand that the new regulations promulgated by the U.S. Treasury Department contain vague exceptions. I am uncertain as to whether I fall within those exceptions, and therefor fear that if I do travel to Cuba as planned, I might be subject to criminal prosecution.

I declare, under penalty of perjury, that the foregoing is true and correct.

DATED: June 8, 1982

/s/ Linda Turner
LINDA TURNER

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RUTH WALD, ET AL., PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

STATE OF CALIFORNIA
COUNTY OF ALAMEDA

I, Karen Wald, being of full age declare and affirm:

1. I am a coordinator of the Cuba Resource Group, Post Office Box 7021, Oakland, CA 94601. I have particular responsibility for the group's travel activity.

2. The Cuba Resource Group is an unincorporated association which serves as an educational resource and information center about Cuba.

3. Among the services that the group provides are sponsoring tours and providing referral services as to how groups and individuals can travel to Cuba either singly or in tours.

4. In the past the Cuba Resource Group has sponsored "family tours" (for parents and children to travel together to Cuba to learn about that country) and also a tour for teachers which involved studying the educational system of Cuba as well as general tourist activities.

5. The Cuba Resource Group receives a ten to fifteen percent commission from each person travelling on our own tours and for each person who is referred by us and who travels on a regular package tour sponsored by various travel agencies.

6. I have read the new regulations regarding travel to Cuba and find them so vague and ambiguous that the Cuba Resource Group is unable to function as an information center as to travel or to sponsor tours as we did in the past. We do not know how to advise people as to travel under the new regulations.

7. In particular, for example, we do not know what constitutes travel for the purposes of "professional research or similar activities"; travel which is permitted without a government license under the regulations, thus we are unable to organize tours to Cuba when the people who go on them, and we as organizers, could face criminal prosecution.

8. The Cuba Resource Group is not only prevented from arranging travel to Cuba but is also prevented from facilitating the exchange of information and diverse views between Cubans and Americans.

9. We are also prevented from receiving the funds we would normally obtain from arranging tours and from referring people to travel agencies sponsoring package tours. This loss of funds significantly harms our organization.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on June 5, 1982.

/s/ Karen Wald
KAREN WALD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No.

RUTH WALD, ET AL., PLAINTIFFS

—*v.*—

DONALD REGAN, ET AL., DEFENDANTS

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

Robert C. Howard, being first duly sworn, states:

1. I am a citizen of the United States and a resident of the City of Chicago, State of Illinois.

2. I am a practicing attorney, admitted to the bars of the State of Illinois and the Federal Court. I graduated from Harvard Law School in June 1967. I am a partner in the firm of Pressman & Hartunian, Chtd., Room 4005, 55 East Monroe Street, Chicago, Illinois 60603.

3. I have been interested for some time in going to Cuba for purposes of a winter vacation and to see the country, its people and its culture. I have previously visited Jamaica (four times) and Mexico (two times) for similar reasons.

4. In March 1982, I decided to make a trip to Cuba for the above purposes in December 1982, together with my children and several friends.

5. The Cuban Assets Control Regulations: Travel-Related Transactions, issued by the Department Of The

Treasury effective May 15, 1982, appear to pose a significant obstacle to my making the trip to Cuba described in paragraphs 3 and 4. The regulations state that there is no general license for financial transactions in connection with tourist travel to Cuba. I have therefore had to cancel the decision made in March 1982 concerning travel to Cuba.

6. The new regulations also contain vague exceptions concerning circumstances in which there is a general license for transactions in connection with travel to Cuba (e.g., "for the purpose of gathering news, making news or documentary films, engaging in professional research, and for similar activities . . . ."). The vagueness of these regulations leaves me unclear as to what type of purposes will be regarded as valid for travel to Cuba, and what type of purposes might subject me to adverse governmental action of some kind.

7. The obstacles and uncertainties posed by the new regulations are injurious to me because they interfere with my freedom to travel where I wish; because I have been compelled to cancel my travel plans as described above; because I apparently precluded from travel to Cuba for purposes of tourism and of learning about the country, its people and its culture; because I am apparently precluded from affording my children the opportunity of travel to Cuba for these purposes; and because I am left in considerable uncertainty, concerning travel to Cuba, as to the purposes that might be regarded as valid and the purposes that might subject me to some form of adverse action by the government.

/s/ Robert C. Howard
ROBERT C. HOWARD

SUBSCRIBED AND SWORN to
before me this 4th day
of June, 1982.

/s/ Elizabeth Lynch
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RUTH WALD, ET AL., PLAINTIFFS

—against—

DONALD REGAN, ET AL., DEFENDANTS

AFFIRMATION

STATE OF PENNSYLVANIA)
) ss.:
COUNTY OF BUCKS)

I, Francis E. Bradley being of full age, declare and affirm:

1. I am a United States citizen residing in Newton, Bucks County, Pennsylvania.

2. I am Assistant Headmaster of George School, a secondary school operated by the Society of Friends (Quakers) in Newton, Pennsylvania.

3. I have been engaged since Autumn, 1981 in planning a trip to Cuba for a group of students from various Friends' schools in Pennsylvania and the Northeastern United States. A document describing the schedule planned for the trip, distributed to persons applying for the trip, is attached as Exhibit A *infra*.

4. The trip is scheduled to depart for Cuba on June 18, 1982.

5. I will be the leader of the trip. The purpose of the trip is educational, and for this reason the trip is sponsored by the George School.

6. On April 23, 1982, formal permission for the trip was requested through an application for a license from the Office of Foreign Assets Control. A copy of that letter is attached as Exhibit B *infra*.

7. Congressman James K. Coyne, who represents the district in which I live and work, wrote the Office of Foreign Assets Control in support of the request for permission to travel. A copy of that letter is attached as Exhibit C *infra*.

8. We have been verbally told by the Office of Foreign Assets Control that the requested permission has been denied. We have been promised a written response to the request, but to date none has been forthcoming.

9. I have previously led a similar trip to Cuba for a group of students from Friends' schools in 1978.

10. The government's actions deny us the right to travel to Cuba and to acquaint ourselves at first-hand with a different culture and social system. The trip which I plan to lead would be a valuable educational opportunity for those traveling, both for myself, as leader, and for the students, and the deprivation of our rights and violation of our freedoms has caused us and our country substantial injury.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 4, 1982.

/s/ Francis E. Bradley

EXHIBIT A

GEORGE SCHOOL

FRIENDS' SCHOOL CUBA TRIP

TENTATIVE ITINERARY

JUNE 16-1:00 p.m.

Arrive at George School

JUNE 16-18

Preparation for trip through a series of films, speakers and discussions . . . time to become acquainted with students from other schools

JUNE 18

Depart from George School for Newburgh, New York to leave via Arrow Airlines for Havana

JUNE 18

Arrive in Havana

JUNE 18-JULY 2

Travel in Cuba to include the following cities and towns: Havana, Santiago, Holguin, and the Isle of Youth

JULY 2

Departure from Havana—arrive at George School

I.C.A.P. (The Cuban Friendship Institute), in response to our requests, has arranged a trip which will promote a dialogue with Cuban Youth and acquaint us with Cuban history, culture, and education.

Our schedule will include the following:

1. MUSEUMS (in Havana)
   - —Literacy Musem
   - —Museum of the Revolution
   - —Museum of the Cuban People (Museo del Pueblo Combatiente)
2. CULTURAL ACTIVITIES
   - —Baseball game
   - —Musical or dance concert
   - —Coffee House, featuring folk music
3. ORGANIZATIONAL MEETINGS—Representatives from the following groups plan to meet with us in Havana—
   - —Student Christian Movement
   - —Federation of Women
   - —Cuban Friendship Institute
   - —Federation of Secondary School Students
   - —Young Communist League
   - —A meeting with a committee for the Defense of the Revolution
4. SCHOOLS
   - —Visits to: Elementary School, Day Care Center, Secondary Schools in rural and urban settings, as well as the new Sports School, Lenin Technical School, and the Jose Marti Pioneer Camp
5. CHURCH GROUPS
   - —One Sunday will be spent attending several Cuban churches through the Cuban Ecumenical Council

6. PRESENTATIONS AND DISCUSSIONS

—We will be part of the programs on the "Effects of the Economic Blockade of Cuba" as well as "The struggle to Eliminate Racism in Cuba

—We will also attend a baseball game

TRIPS OUTSIDE OF HAVANA WILL INCLUDE

—Flight to Santiago with return by bus

—Two days with Cuban Friends in the small city of Holguin

—A visit to the Moncada

—Two-three days on the Isle of Youth, an island off the S.W. coast of Cuba where international students are invited, mostly from Third World Countries to learn of the Cuban experience. Our group plans to spend time with the international students in a camp setting which will include a cultural program

GEORGE SCHOOL

23 April 1982

Chief of Licensing
Foreign Assets Control
Department of the Treasury
1331 G Street, N.W.
Washington, D.C. 20220

Dear Friends:

As a result of discussions with the Cuban Government during the last 12 months, George School has been invited by the Cuban Friendship Institute (I.C.A.P.) to sponsor an educational visit to Cuba. The group is comprised of 20 teachers and students from 7 Quaker schools on the east coast. The participants are scheduled to arrive at George School for a two-day orientation beginning on 16 June 1982; departure for Cuba is scheduled for 18 June; and the delegation is to return to the United States on 2 July.

The purpose of the visit to Cuba is to promote discussions between Cuban and American youth and to educate the students and teachers in our schools about the country of Cuba. At a time when tension is increasing in the Caribbean basin, I am persuaded that educational trips of this kind by private educational and religious groups take on increased importance.

I am writing to your office at the suggestion of Congressman James Coyne to request formal authorization for the George School delegation to travel to Cuba for the purposes I have described above. I have enclosed an itinerary for your information together with a George School catalogue. Naturally I am anxious to answer further questions you might have about the trip if that would be useful.

I understand that Mr. Ray Konan, on your legal staff, has advised Congressman Coyne that you would normally

be able to verify authorization within the next week. In view of the fact that a number of families are involved in plans, I do want to ask that you communicate with me on this matter as soon as possible.

Thank you very much for your assistance.

Sincerely,

/s/ David L. Bourns
DAVID L. BOURNS

DLB:mp

cc: Congressman James Coyne; Mar Azul Travel Agency

EXHIBIT C

[SEAL]

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

April 22, 1982

Chief of Licensing
Foreign Assets Control
Department of the Treasury
1331 G Street, N.W.
Washington, D.C. 20220

Dear Sir:

Following up my staff assistant's telephone conversation with Mr. Ray Konan, I am writing in support of the request for permission to travel to Cuba made by The George School, a private high school located in my district.

It is my understanding that The George School has arranged a trip to Cuba for the period of June 18 to July 2 for a delegation of students from both The George School as well as other Friends' schools. This visit continues the tradition and longstanding policy of The George School to promote intercultural understanding through the many exchange programs and trips to foreign nations. The purpose of this trip is exclusively educational. This delegation of students will be meeting with other schools in Cuba, as well as with church groups and various community organizations. As a resident of the Newton area, I have been familiar with the goals and pursuits of The George School for many years. It is my belief that this trip will help to broaden the outlook of these students

and expose to them a contrasting political-economic system.

Thank you for your prompt attention to this matter.

Sincerely,

/s/ Jim Coyne
JAMES K. COYNE
Member of Congress

JKC/np

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil No. 82-1690-T

RUTH WALD, ET AL., PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

MOTION FOR A TEMPORARY RESTRAINING ORDER

Pursuant to Rule 65, Fed. R.Civ.P., plaintiff Francis E. Bradley respectfully moves for a temporary order restraining defendants from interfering in any way, including by threats or subsequent punishment, with the trip to Cuba which he is scheduled to lead on or about July 9, 1982 for up to fourteen high school students from various Friends' schools.

The groups for this motion appear in the attached declaration of Charles S. Sims; the affirmation of Francis E. Bradley, filed on Thursday, June 17, 1982; and the Brief in Support of Plaintiffs' Motion for Preliminary Injunction, also filed on June 17, 1982.

/s/ Charles S. Sims
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
212/944-9800

DORIAN BOWMAN
JUDITH FARRIS BOWMAN
Bowman & Bowman, Esqs.
51 Brattle Street, Suite 37
Cambridge, Massachusetts 02138

LEONARD B. BOUDIN
ERIC M. LIEBERMAN
JULES LOBEL
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman, P.C.
National Emergency Civil
Liberties Committee
30 East 42nd Street
New York, New York 10017
212/697-8640

MICHAEL RATNER
SARAH WUNSCH
MARGARET L. RATNER
ROBERT BOEHM
Center for Constitutional Rights
853 Broadway
New York, New York 10003
212/674-3303

HAROLD A. MAYERSON
DEBRA EVANSON
National Lawyers Guild
30 East 42nd Street
New York, New York 10017
212/599-2954

VICTOR GOODE
DEBORAH JACKSON
National Conference of Black
Lawyers
126 West 119th Street
New York, New York 10026
212/864-4000

June 23, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil No. 82-

RUTH WALD, ET AL., PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

DECLARATION OF CHARLES S. SIMS

I, CHARLES S. SIMS, being of full age, declare and affirm:

1. I am attorney for Francis E. Bradley in this action and make this declaration of facts in my own knowledge.

2. Since May, 1981, I have been in frequent contact with Mr. Bradley concerning his plans (detailed in the Complaint and in his affirmation previously filed) to lead a trip to Cuba for a group of fourteen students from various Friends' schools in Pennsylvania and the northeastern United States. That trip was originally scheduled to leave for Cuba on June 18, 1982.

3. When preparation of the complaint and papers for a motion for preliminary injunction made it clear that the filing of the complaint would be delayed until June 17, 1982, I informed Mr. Bradley that he could not realistically expect to receive judicial relief by June 18, 1982.

4. Mr. Bradley thereupon undertook to contact the families of the fourteen young persons who had agreed to participate on the trip to determine whether the trip

could be delayed; if so, until what date; and the date by which families would need to know one way or the other so as to make alternative plans for their teenagers' vacations. He also contacted the charter operator and Cuban officials to learn whether the trip could be delayed.

5. Mr. Bradley informed me this morning of the following information. First, one trip participant has already cancelled because of the delay and the uncertainty concerning whether the trip will be permitted to leave by United States authorities. Second, a sufficient number of families will be able not to withdraw if the trip can leave no later than July 9, 1982, but only if they can be reliably so informed by Friday, June 25, 1982. Otherwise, it appears that if no decision is forthcoming by that time, the trip will have to be cancelled because of numerous additional withdrawals. Third, it appears that, so far as the charter operator and Cuban officials are concerned, the trip can be delayed until July 9, 1982 and not later.

6. As Mr. Bradley emphasized to me, the young people on the trip have planned for it for months. In some cases the students have raised their own money for it. They, and their families, have made and relied on summer plans based on the previous longstanding policy of the United States government to permit travel to Cuba. It is extremely late to be making changes in their summer plans. Many other trips or vacation plans which those families and their teenagers could have made have been foregone in reliance on that previous government policy. The change in policy has resulted in great disruption and irreparable harm to Mr. Bradley and those young people, detailed in his affirmation previously filed. Their right to travel and their First Amendment right to seek information on Cuba at first-hand will be irreparably damaged.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 22, 1982.

/s/ Charles S. Sims
CHARLES S. SIMS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1690-T

RUTH WALD, MARIAN LOWE, ROSARIO MORALES, FRANCIS E. BRADLEY, REV. ALICE HAGEMAN, CUBA RESOURCES GROUP, ROBERT C. HOWARD, CENTER FOR CUBAN STUDIES, LINDA TURNER

v.

DONALD REGAN, Secretary of the Treasury, JOHN M. WALKER, JR., Assistant Secretary of the Treasury, DENNIS M. O'CONNELL, Director, Office of Foreign Assets Control, ALEXANDER M. HAIG, JR., Secretary of State, and RONALD WILSON REAGAN, President of the United States

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REPORT RE: MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER SCHEDULING HEARING ON MOTION FOR PRELIMINARY INJUNCTION

COLLINGS, U.S.M.

This case was ordered referred to a United States Magistrate for findings and recommendations on the plaintiffs' (1) Motion For A Temporary Restraining Order (#06, filed 6/23/82) and (2) Motion For a Preliminary Injunction (#03, filed 6/17/82).

A hearing was scheduled before me on the Motion For A Temporary Restraining Order for 10:00 A.M., Friday, June 25, 1982. Since notice was given to the United States Attorney for the District of Massachusetts with respect to the hearing and since the United States Attorney indicated that an Assistant U.S. Attorney would

be present at the hearing it was my intention to hear the Motion For A Temporary Restraining Order as a motion seeking a preliminary injunction just as to those matters as to which relief was sought in the Motion For A Temporary Restraining Order. It was my view that treating the Motion For A Temporary Restraining Order in this way, I would have the power to hear the matter and make findings and recommendations to the Court pursuant to Rule 3(a)(3) of the Rules For United States Magistrates In the United States District Court For The District Of Massachusetts, which provides, in pertinent part:

> In accordance with 28 U.S.C. Section 636(b)(1)(B) and (C), a full-time magistrate . . . may conduct such evidentiary hearings as are necessary or appropriate, and submit to a judge proposed findings of fact and recommendations for the disposition of: (3) motions for injunctive relief (including preliminary injunctions but excluding motions for temporary restraining orders) . . .

However, at the outset of the hearing at 10:00 A.M. on June 25th, both counsel for the plaintiffs and counsel for the defendants objected to my characterizing the motion as one for injunctive relief as opposed to one seeking a temporary restraining order and, as a consequence, both took the position that I did not have the power to hear the Motion For A Temporary Restraining Order. In these circumstances, I was of the view that I should not proceed to hear the Motion For A Temporary Restraining Order, however characterized, without further instructions from the District Judge to which this case is assigned.

Upon consultation with the District Judge to whom this case is assigned, I was advised not to hear the Motion For A Temporary Restraining Order over the objection of the parties and, since he was not available to hear the Motion, to return the file to the Clerk for reference to the Judge currently assigned to the Miscellaneous Business Docket.

Therefore, the file is returned to the Clerk's Office with instructions to refer the Motion For A Temporary Restraining Order to the District Judge currently assigned to the Miscellaneous Business Docket.

It is ORDERED that the Motion For A Preliminary Injunction be heard at *2:00 P.M. on Thursday, July 1, 1982 at Courtroom #8, Ninth floor, John W. McCormack Post Office and Court House, Boston, Massachusetts*, this being the date agreed upon by the parties for the hearing on said motion.

/s/ Robert B. Collings
ROBERT B. COLLINGS
United States Magistrate

June 25, 1982.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1690-T

Magistrate No. 82-

RUTH WALD, ET AL., PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

DEFENDANTS' OPPOSITION TO PLAINTIFF BRADLEY'S MOTION FOR TEMPORARY RESTRAINING ORDER

Defendants Donald Regan, et al., oppose recommendation by the Magistrate of grant of a preliminary injunction to Francis E. Bradley. Plaintiffs have shown no adequate basis for precipitously licensing the George School group to travel to Cuba without the special permit from the Secretary of the Treasury required under the Trading With The Enemy Act ("Act"), § 5(b), and regulations promulgated thereunder.

1. *Plaintiffs Have Not Established A Substantial Probability Of Success On The Merits Because The New Regulations Are Constitutional And Congressionally-Authorized*

None of plaintiffs' several attacks upon the newly issued regulation, 31 C.F.R. § 515.560, show a substantial probability of success on the merits.

Plaintiffs' principal claim is that the new § 515.560 is barred by the 1977 amendments to the Act. In plaintiffs' view Congress, by grandfathering then-exercised "uses"

of § 5(b) authorities, meant to freeze the particular uses of those authorities as to a particular country. That is to say, plaintiffs claim that Congress intended that then-existing § 5(b) regulations regarding Cuba could no longer be changed absent compliance with the new emergency procedures established by the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* ("IEEPA"). Since the President has not declared a new emergency under IEEPA regarding Cuba, the claim runs, the new amendments to the Cuban Asset Control Regulations are *ultra vires.* Plaintiffs support their claim by selected quotations from the legislative history of the grandfather clause.

A deeper look, however, shows the baselessness of plaintiffs' interpretation. First, plaintiffs' brief misrepresents the structure of the Cuban Asset Control Regulations in 1977. In July, 1977, § 515.560 did indeed authorized travel transactions with Cuba (prior to 1977 travel transactions were banned under the regulations), but only as an *exception* to the standing exercise under § 5(b) of the authority completely to prohibit *any* economic transactions with Cuba. *See* 31 C.F.R. § 515.201. Even if plaintiffs' view of legislative intent is correct, in other words, the Secretary in 1977 was exercising his § 5(b) authority to regulate travel transactions with Cuba, but in the conditions of those times permitted such travel.

More importantly, however, plaintiffs' interpretation of legislative intent is clearly wrong. Review of the complete transcripts of the various hearings noted by plaintiffs makes plain that the Committee had no intention to restrict exercise of § 5(b) regarding countries, such as Cuba, as to which a declaration of national emergency had been invoked as of 1977 (other than to require the President annually to declare that continuation of such declarations of emergency were in the national interest). *See* Hearings Before the Sub-committee on International Economic Policy and Trade, 95th Cong., 1st Sess., on H.R. 1560 and H.R. 2382, at 165-219 *passein* (attached hereto as Exhibit A).

For example, Representative Bingham at p. 211 makes clear that the intent was to grandfather "existing situations", i.e., countries. A spokesman for the Administration, Mr. Santos, at p. 191 specifies that "particular emergencies" were being grandfathered; and at p. 211, Mr. Santos and Mr. Majik, a committee staffer, had a colloquy to the effect that the legislation was not aimed at "existing" —— usages" of the emergency power so that, if a President claimed a need to do something new in Cuba, his authority would be "automatic" under the grandfather clause. *See also* H.R. 95-459 at p. 13, which describes the bill as permitting the President to extend all "existing uses" of § 5(b) authorities by merely renewing the declarations of emergency.

Plaintiffs seek to capitalize upon an inherent ambiguity of the phrases "exercise" and "usage" of § 5(b) authority: do the phrases mean actual regulations stemming from such powers or the underlying assertion of such powers regarding particular countries? Defendants submit that a fair reading of the entire legislative history conclusively establishes that Congress meant to grandfather existing emergencies, not to freeze particular regulations. Had the latter been its intent, Congress would have said so in its enactment.

Third, and conclusively on this motion, the only court to have faced the meaning of the grandfather clause, not surprisingly, upheld the Secretary's power to issue new controls regarding Cuba under § 5(b) in order to deal with new facets of the declared emergency. *United States* v. *Fernandez-Pertierra*, No. 81-233-CR-JWK, Southern District of Florida (September 30, 1981) (copy attached as Exhibit B), was a criminal prosecution for violations of 31 C.F.R. § 515.415, a regulation promulgated in 1980 under § 5(b) and its grandfather clause in order to deal with the "Freedom Flotilla" from Mariel, Cuba. The defendant there raised the self-same claim as plaintiffs that no new regulations regarding Cuba were permissable. The Court, however, slip opinion at p. 4, held that new

regulations with regard to a country already subject to § 5(b) were permitted. On this claim, accordingly, plaintiffs have not come close to meeting their burden of showing a substantial probability of success on the merits.

Plaintiffs' other claims are equally meritless. Regarding the Passport Act, clearly limitation of one power does not entail limitation of a distinct power. That printing travel restrictions into passports is no longer authorized says nothing about the President's ability to use other powers to restrict an opposing nation's economic means. The regulations in question, by preventing members of the George School group from spending "hard currency" in Cuba, clearly do serve primarily to further the purposes of the Act, and cannot be viewed simply as an evasion of the Passport Act. Indeed, such a purpose is belied by the general and special permits that the regulations provide for travel transactions with Cuba.

Plaintiffs' constitutional claims are equally unavailing. It is well-settled that the freedom to international travel may be incidentally restricted by foreign policy or other concerns, *Haig* v. *Agee*, 453 U.S. 280, 307 (1981); *Califano* v. *Aznavorian*, 439 U.S. 170, 177 (1978); *Zemel* v. *Rusk*, 381 U.S. 1 (1965). A reasonable basis for the restrictions is required, not a "compelling" one, *Aznavorian*, *supra*. Given that "Protection of the foreign policy of the United States is a governmental interest of great importance, "*Agee*, *supra*, at 307, and that such matters "are rarely proper subjects for judicial intervention," *id.* at 292, plaintiffs clearly have not met their high burden to show substantial probability of success on the merits. Much more complete consideration of their claims is required prior to reaching such a conclusion.

2. *The George School Group Will Suffer No Irreparable Harm From Delay*

Nothing in the record suggests that the members of the George School group will suffer irreparable harm if their motion is denied pending a more complete consideration

of this case. First, plaintiffs do not claim that any member of the group will permanently lose the option of traveling to Cuba if this trip is cancelled but plaintiffs ultimately prevail. The only loss would be participation in *this* trip, but plaintiffs do not claim any uniqueness of this trip, and this trip is hardly an entity with rights of its own. Any harm, therefore, consists entirely of delay in the group members exercise of the rights they claim.

In the circumstances, such delay cannot qualify an irreparable harm sufficient to force the Court into a hasty decision. Such delay is in itself too insubstantial. Further, the risk of such delays was brought on by plaintiffs themselves. The regulations were promulgated in April, and clearly were aimed at preventing travel transactions such as planned by the George School. Yet only now have plaintiffs come to Court demanding instant decisions, even though their planned departure date is two weeks away. See *Anderson* v. *Federal Election Commission*, 635 F.2d 3 (1st Cir. 1980).

Finally, plaintiffs and defendants agreed that a hearing on the plaintiffs' initial motion for a preliminary injunction would take place no earlier than June 29. Defendants' counsel will be in Washington, D.C. on June 28 to consult with representatives of the Treasury, Justice, and State Departments, to prepare affidavits, and to help crystallize an emerging policy. In such circumstances, denial of relief at least until further hearing next week is clearly desirable.

3. *A Balancing Of Harms Tips Against Relief Because Issuance Of Relief Would Decide The Ultimate Question As To These Plaintiffs.*

Grant of the requested relief would moot the question of the new regulations' validity as applied to the George School group. The purpose of the new regulations would be completely eviscerated insofar as such travellers are concerned. While the amount of foreign exchange Cuba

would earn from the George School trip is not in itself enormous, clearly the economic benefit to Cuba is not *de minimus*. In any event, there is no requirement for a *de minimus* exception to the regulations, *Orrin* v. *Secretary of the Treasury*, C.A. No. 2408-69 (D.D.C.) (April 27, 1972) (seizure of three books purchased in Vietnam).

Such finality of the requested relief clearly cuts against granting relief. *Anderson*, *supra*. As against the finality of harm to the purposes of the regulations, plaintiffs interpose mere delay in their opportunity to go to Cuba. Balancing those factors clearly should result in a denial of relief, particularly where plaintiffs' case on the merits is so weak.

4. *The Public Interest Has Been Established In The Regulations.*

Through the original invocation of the Act's powers against Cuba, through continuation under a succession of Administrations of that invocation, and through Congressional endorsement by the grandfather clause, this country's foreign policy regarding Cuba has been definitely established. The current Administration's particular decisions concerning the need to use the Act's various authorities against Cuba must be accorded the Court's usual deference to the President's "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); see *Haig* v. *Agee*, *supra*. While the freedom of international travel is indeed important, the public interest of this nation lies as well in a strong and consistent foreign policy. The public interest in this case, accordingly, lies in upholding the new regulations at least pending definitive consideration of their validity. In the area of foreign relations, the public interest permits no precipitous erosion of the President's congressionally authorized powers.

Conclusion

For the reasons stated, the Magistrate should recommend against grant of preliminary relief—relief that will finally decide the case as to the George School group.

By their attorney,

WILLIAM F. WELD
United States Attorney

by: /s/ R. A. Child
RALPH A. CHILD
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil No. 82-1690-T

RUTH WALD, ET AL., PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

TEMPORARY RESTRAINING ORDER

On consideration of plaintiff Francis E. Bradley's motion for a temporary restraining order, the accompanying papers and defendants' opposition thereto, it is hereby

ORDERED, that defendants, their servants, agents and employees are hereby temporarily restrained from interfering in any way, including by threats or subsequent punishment, with a trip to Cuba Mr. Bradley is scheduled to lead on or about July 9, 1982, for up to fourteen high school students from various Friends' schools, pending a further hearing on a motion for preliminary injunction.

/s/ P. David Mazzone
P. DAVID MAZZONE
United States District Judge

Date: JUNE 25, 1982 3:30 PM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action File No. 82-1690-T

RUTH WALD, MARIAN LOWE, ROSARIO MORALES, FRANCIS E. BRADLEY, REV. ALICE HAGEMAN, CUBAN RESOURCE GROUP, ROBERT C. HOWARD, CENTER FOR CUBAN STUDIES, LINDA TURNER, PLAINTIFFS

v.

DONALD REGAN, JOHN M. WALKER, JR., DENNIS M. O'CONNELL, ALEXANDER M. HAIG, JR., RONALD WILSON REAGAN, DEFENDANTS

DECLARATION OF MYLES R. R. FRECHETTE

Myles R. R. Frechette, under penalty of perjury, declares and says as follows:

1. I am a career Foreign Service officer in the Foreign Service of the United States. In my present assignment I am the Director of the Office of Cuban Affairs in the Department of State. I have held that office since August 27, 1979. I have previously served for over two years in the Office of Cuban Affairs (1963-1965) and have dealt over the intervening years with various aspects of Cuban foreign policy in carrying out my responsibilities as a Latin American specialist in the Foreign Service.

2. As Director of the Office of Cuban Affairs, I am familiar with the United States policy concerning Cuba. I am responsible for the day-to-day conduct of U.S. foreign policy concerning Cuba in implementation of policy guidance provided by the President, the Secretary of State, and the Assistant Secretary of State for Inter-American Affairs.

3. I make this declaration, which is based upon information made known to me in the performance of my offi-

cial duties, in order to explain the foreign policy interests underlying the modification of the Treasury Department regulations at issue in this case and to explain the injury to our foreign policy interests that would result if this court should grant a preliminary or other injunction against enforcement of those regulations.

4. The United States does not now, and has not for many years, enjoyed good relations with the Government of Cuba. Since 1978, Cuba, with Soviet political, economic and military support, has provided widespread support for armed violence and terrorism in this hemisphere. Cuba also provides and maintains close to 40,000 troops in various countries in Africa and the Middle East where these forces impede political solutions to regional problems and further Soviet foreign policy interests. It is important to U.S. national security to counter Cuban efforts to further Soviet strategic goals.

5. Since 1963, the United States Government has blocked Cuban assets in this country and has maintained a near total embargo on trade in both goods and services between the United States and Cuba as a vital element of our overall foreign policy towards that country. These controls provide our principal means of expressing our rejection of Cuba's conduct and of increasing the cost to Cuba of its adventurism in this hemisphere and elsewhere.

6. Beginning in 1963, and continually since then, these controls have covered transactions related to travel to Cuba. The regulations at issue in this case involve a partial return to the tighter licensing restrictions on travel related transactions which were in effect between 1963 and 1977. They were adopted as a means to impose additional economic costs upon Cuba in the face of that country's promotion of armed violence, terrorism, and instability in this hemisphere and elsewhere in the world.

7. The Cuban economy suffers from acute mismanagement and a chronic shortage of freely convertible Western currency. At the moment, Cuba's hard currency position is especially difficult; Cuba's foreign debt to the West

is about $2.6 billion, about $1.7 billion of which is owed to Western banks.

8. The Government of Cuba has begun actively to promote tourism to Cuba from the United States, from Canada, and from other Western countries as a major source of badly needed hard currency.

9. The regulations at issue in this case were adopted not only to deny Cuba current hard currency income derived from tourist and exploratory business travel by U.S. nationals, but more importantly to restrict future hard currency income sought by Cuba through a planned major expansion of its tourism industry. This action was taken as a sanction against Cuba in order to inflict a clear and substantial cost on Cuba's continued adventurism and support for subversion. These regulations on transactions related to travel to Cuba then are an integral part of the overall embargo on trade with Cuba which denies that country the benefits of significant economic interaction with U.S. markets or U.S. nationals.

10. Accordingly, the regulations at issue in this case were adopted to serve important foreign policy interests of the United States. An injunction against the application of these regulations would substantially harm these foreign policy interests and therefore be inconsistent with the public interest. In the short term, such an injunction would suggest to the Cubans and to their Soviet patrons that the United States may be weak or ineffective in its response to Cuban adventurism. Moreover, over the longer term an injunction against these regulations would permit Cuba increased access to hard currency via U.S. business and pleasure travelers. This would contribute to the stability and viability of the Castro regime and to its continuation of policies detrimental to U.S. national interests.

I declare, under penalty of perjury, that the foregoing is true to the best of my knowledge and belief.

/s/ Myles R. R. Frechette
MYLES R. R. FRECHETTE

Current Policy No. 352

STRATEGIC SITUATION IN CENTRAL AMERICA AND THE CARIBBEAN

December 14, 1981

United States Department of State
Bureau of Public Affairs
Washington, D.C.

Following is a statement by Thomas O. Enders, Assistant Secretary for Inter-American Affairs, before the Subcommittee on Western Hemisphere Affairs of the Senate Foreign Relations Committee, December 14, 1981.

Major Developments

There are four major developments that have come together to create what can only be described as a state of danger in the Caribbean Basin.

One is the new Cuban strategy for uniting the left in the countries of the region, committing it to violence, arming it, training it in warfare, and attempting to use it for the destruction of existing governments. I say new because it is only 3 years ago that the policy was adopted. Prior to 1978—for some 10 years since the death of Che Guevara on an Andean hillside—Cuba had made a sustained effort to portray itself as a member of the international community not unlike others, carrying on state-to-state relations through embassies, emphasizing trade and cultural contacts.

Observing this pattern, many in this and other countries of the hemisphere began to hope that revolutionary Cuba was on the way to becoming a status-quo nation. The 1970s, of course, were marked by Cuban intervention in Africa on a continent-wide scale. But, it was argued, Africa was a special case.

The turn came in 1978, when Cuba decided to back the insurrection in Nicaragua. At first it was not apparent to many that a new Cuban strategy was in operation, for Nicaragua seemed like a case all of its own. But then the same thing was tried in El Salvador, in Guatemala, in Colombia; now it is being tried in Honduras.

We have attempted to identify and illustrate the full scope of this new Cuban strategy in a research paper (see Special Report No. 90), which I would like to submit to the committee for its study. The paper is based on both public and intelligence sources. It was not written to make sensational revelations, and it does not. But I wonder how many Americans are aware of the sweep and the sophistication of what is going on. In many countries of the region, Cuba is attempting no less than to construct a machine to destroy the established governments.

The pattern is always the same. For years the radical left in the area has been divided by disagreement over tactics. The old-line Comintern parties argued patience: You only had to wait for Marx's famous objective conditions to emerge, and the revolution would occur. Other factions were for setting up Che Guevara-style *locos*: put some armed guerrilleros into the countryside and their presence will radicalize the peasants. Others were for *guerro prolongada*: discredit the regime by hitting the economy. Still others advocated spectacular kidnapings and assassinations.

Let me in this regard make a remark on the subject of proposals for negotiation between the government and the insurgents. Members of the Frente Democratico Revolucionario (FDR) say they want to talk about "restructuring the army" and "establishing a new order." In their view such changes are conditions precedent to elections.

But the establishment of a new order and the status of the army are among the subjects for the constituent assembly to be elected in March. Why should they only be debated and decided with the insurgents and not with the

compesinos, the labor unions, and the political parties? Why shouldn't the FDR have—only have—the representation in the assembly it can get by campaigning?

In July the United States said it would facilitate contacts and discussions on election issues. In September we sent a group to El Salvador and talked to all interested in talking to us, including the Movimiento Nacional Revolucionario (MNR), a member of the FDR. The representative of another member of the FDR has asked to see us in Washington this week, and we are receiving him on the same basis. If there are opposition elements who believe in a democratic solution, we will help them participate in the electoral process. But it would be wrong to assist those—in negotiations or otherwise—who are committed to the destruction of democracy.

Fourth, we must continue the pursuit of justice for the countries of the area. Lawlessness from both the left and right has been a major weakness in El Salvador. But the government is making progress in bringing it under control. Violent deaths other than in combat as reported each week by our Embassy in San Salvador are down by more than a half since last year. I do not want to give you the impression that our weekly figures are complete. But the trend is significant. Progress is unmistakable. I wonder whether the insurgents have made any contribution to that progress at all. For they claim that their violence is justified by a higher goal.

Fifth, our emphasis should be on collective action. Last week the Organization of American States voted 22 to 3 with 4 abstentions in support of free elections as a means to a political solution in El Salvador. In the same forum Secretary Haig has suggested that all countries in Central America should address the arms race that now threatens in Central America as a result of Nicaraguan imports of heavy weapons and the Cuban military adviser presence in Nicaragua. Should more serious threats emerge, it is in collective security that we should seek solutions.

Finally, we must communicate to Cuba that the costs of escalating its intervention in this region will be very high. We have readied measures to prevent another Mariel sealift should Cuba again seek to utilize the longings of its own citizens to harm this country. We are tightening the economic embargo. We are preparing creation of a radio devoted to Cuba news and beamed to the island so that Cubans can be better able to hold their government accountable for its actions. Our underlying message is clear. We will not accept, we do not believe the countries of the region will accept, that the future of the Caribbean Basin be manipulated from Havana. It must be determined by the countries themselves.

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Current Policy No. 376

CUBAN SUPPORT FOR TERRORISM AND INSURGENCY IN THE WESTERN HEMISPHERE

March 12, 1982

United States Department of State
Bureau of Public Affairs
Washington, D.C.

Following is a statement by Thomas O. Enders, Assistant Secretary for Inter-American Affairs, before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, March 12, 1982.

The Administration shares your concern about the growth of terrorism and violence in today's world. I welcome this opportunity to address the issue of Cuban terrorism and promotion of violent revolution in Latin America and the Caribbean.

For some 10 years following the death of Che Guevara on an Andean hillside, Cuba attempted to portray itself as a member of the international community not unlike others, carrying on state-to-state relations through embassies, and emphasizing trade and cultural contacts.

Cuba, however, never stopped glorifying violent revolution. During an entire generation, Cuba carefully nurtured agents and contacts with groups committed to violence, often providing ideological and military training to several groups in the same country. Then, in 1978, almost without notice, Castro began to implement a strategy of uniting the left in the countries of the hemisphere, with the purpose of using it as a tool for the violent overthrow of existing governments and the establishment of more Marxist-Leninist regimes in this hemisphere.

In 1978, Cuba helped unite three Sandinista factions, then committed itself militarily to the rebellion in Nicar-

agua. At first it was not apparent to many that a new Cuban strategy was in operation, for Nicaragua seemed like a unique case. But then Cuba began to try the same thing in El Salvador, in Guatemala, in Colombia; now it is repeating the pattern in Honduras. Even Costa Rica is now exposed to the threat of externally backed terrorism.

Cuban intervention is, of course, not the only source of terrorism in the hemisphere. Violent conflict in Latin America has many origins, including historical social and economic inequities which have generated frustrations. Especially in the Caribbean Basin, economic crisis has recently subjected fragile institutions to additional stresses, increasing their vulnerability to radicalism as well as violence.

Clearly, however, Cuba's readiness to foment violence to exploit such situations imposes serious obstacles to economic progress, democratic development, and self-determination. On December 14, I delivered to the Congress a special report on Cuban covert activities in key countries (see Special Report No. 90—"Cuba's Renewed Support for Violence in Latin America"). I would like to take this opportunity to review and update some specific cases of Cuban export of violence.

South America

The immediate danger, it is evident, is in Central America. But the pattern is present in South America as well. In Chile, Cuban training of MIR [Movement of the Revolutionary Left] guerrillas has increased substantially in the past 18 months. In January, the Chilean Communist Party leadership met in Havana. A handful of senior Cuban officials attended and pressed hard for unity of all opposition forces in Chile and intensification of all forms of struggle, including violence.

The most prominent South American case, however, is Colombia. In February 1980, Colombian M-19 terrorists seized the Dominican Embassy, holding 18 diplomats—

including the American, Mexican, and Venezuelan ambassadors and the Papal Nuncio—hostage for 61 days. As part of the negotiated settlement, the terrorists were flown to Cuba and given asylum. That summer, Cuban intelligence officers arranged a meeting among M-19 members with representatives of two other Colombian extremist organizations, the ELN [Army of National Liberation] and the FARC [Revolutionary Armed Forces of Colombia]. Full unification was not achieved but practical cooperation increased.

In November 1980, the M-19 sent 100-200 activists to Cuba for military training. This group was joined by M-19 terrorists already in Cuba, including Rosenberg Pabon Pabon, the leader of the Dominican Embassy takeover. The Colombians were trained by Cuban instructors in explosives, automatic weapons, hand-to-hand combat, communications, and rural guerrilla tactics. In February 1961, their Cuban training completed, these guerrillas infiltrated into Colombia by boat along the Pacific coast. The attempt of these urban terrorists at an armed uprising in the countryside failed. Pabon himself was captured. Cuba denied involvement in the arming and landing of the M-19 guerrillas but not in training them.

The clear evidence of Cuba's role led Colombia to suspend relations with Cuba on March 23. President Turbay commented in an August 13 *New York Times* interview:

> . . . when we found that Cuba, a country with which we had diplomatic relations, was using those relations to prepare a group of guerrillas, it was a kind of Pearl Harbor for us. It was like sending ministers to Washington at the same time you are about to bomb ships in Hawaii.

In an interview published in September 1981, Carlos Rafael Rodriguez, the Cuban Vice President, told the German news magazine *Der Spiegel*, "we did not deny" that we trained the M-19 guerrillas. This, he said, "holds true for the Salvadorans as well."

Neither the anger of President Turbay nor the M-19's failure has deterred Cuba. A new and sizeable group of M-19 guerrillas are today in Cuba receiving military training. We don't know that they will go back to Colombia to attempt new acts of terrorism, perhaps directed against the presidential elections this coming May, but such a pattern seems a reasonable speculation. The M-19 has already gone on record—in a declaration distributed to the media in January—condemning the elections and claiming that "civil resistance, popular combat, and armed warfare are the only roads left open to the people. . . ." This document, which was distributed under the signatures of the M-19's national directorate, pledged that the M-19 would oppose the elections "with all our force." This statement was repeated in late February when M-19 leaders rejected the government's latest amnesty proposal.

For the first time, we now also have detailed and reliable information linking Cuba to traffic in narcotics as well as arms. Since 1980, the Castro regime has been using a Colombian narcotics ring to funnel arms as well as funds to Colombian M-19 guerrillas. This narcotics ring was led by Jaime Guillot Lara, a Colombian drug trafficker now in custody in Mexico. He has admitted to working for Havana in purchasing arms for the M-19. We have information that Guillot traveled twice to Cuba since October 1981 and that on the second visit he received $700,000 from the Cuban Government to purchase arms for the M-19 guerrillas. Last October he played a principal role in transferring the arms he purchased from a ship to a Colombian plane hijacked by the M-19. In addition to arms, Guillot reportedly also transferred funds to the guerrillas through an employee of a Panamanian bank. He maintained contact with the Cuban diplomatic mission in Bogota, including the ambassador, until that mission was closed.

In return for Guillot's services, the Cubans facilitated the ring's trafficking by permitting mother ships carry-

ing marijuana to take sanctuary in Cuban waters while awaiting feeder boats from the Bahamas and Florida. According to a relative of Guillot, one such mother ship detained by Cuban authorities was released when Guillot protested to the Cuban ambassador in Bogota.

Guillot himself has also admitted that a future shipment of arms was to be sent to an unspecified group in Bolivia. These arms, according to Guillot, were to be supplied by an individual in Miami named Johnny. Johnny has been identified as Johnny Crump, a narcotics and arms trafficker now detained in Miami on narcotics charges.

We will continue to follow this case with extreme interest since it is the first firm information we have which implicates Cuba in narcotics trafficking. It also confirms through an independent source what we have suspected that despite Cuban denials, Cuba has provided arms to the Colombian M-19 guerrillas in addition to training them.

Central America

In Central America, the pattern we know well from Nicaragua and El Salvador can be seen now from Guatemala to Honduras and Costa Rica.

Guatemala exemplifies Cuba's systematic efforts to unify, assist, and advise Marxist-Leninist guerrillas. In the fall of 1980, the four major Guatemalan guerilla groups met in Managua to negotiate a unity agreement. Cuban and Sandinista officials attended the signing ceremony. We have obtained copies of the actual secret agreements which make clear that the four guerrilla groups consider themselves a revolutionary vanguard, and believe that Marxism-Leninism establishes the ideological parameters of the Guatemalan revolution. The secret agreements emphasize the importance of creating a national front, whose leadership would be approved by the self-proclaimed revolutionary vanguard, and the necessity of building international solidarity for the Guate-

malan revolution. They spell out the intention of the guerrillas to control decisive political and military power, and fundamental economic power, should the Guatemalan Government be overthrown.

Later last fall, the leadership of the four Guatemalan guerrilla organizations were called to Havana to work further on developing effective unity. In January 1982, they issued a public statement to the people of Guatemala and world opinion, calling for a broad national patriotic unity front. They laid out a deceptively moderate program for a new revolutionary government which would be nonaligned, guarantee freedom of expression, and respect the people's right to elect their own representatives. But the front, they made clear, would be under their leadership as the revolutionary vanguard.

The Marxist-Leninist parameter the Guatemalan revolution laid out in the secret accords are not mentioned in this declaration. Nor is the intention of the revolutionary vanguard to control decisive political and military power. It does not take a great deal of imagination to see why the class struggle and Marxist-Leninist ideas so prominent in secret agreements were deleted from the public declaration.

A similar process appears underway in Honduras. The Cubans currently are using Honduran leftists to transport arms and provide support to insurgents in El Salvador and Guatemala. Nevertheless, the Cubans are looking to the day when guerrilla warfare can be initiated in Honduras itself. Honduran authorities raided several guerrilla safehouses in late November 1981. Captured documents and declarations from detained guerrillas, including several Nicaraguans, revealed that the group was formed in Nicaragua at the instigation of high-level Sandinista leaders, its chief of operations resided in Managua, and members of the group had received military training in Nicaragua and Cuba. Among the captured documents were classroom notebooks from a 1-year training course held in Cuba in 1980. The documents also

revealed that one of the three guerrilla bases discovered was responsible for transporting arms and munitions from Esteli, Nicaragua, into Honduras. We can expect to see the familiar ritual repeated in an effort to bring down the new democratic government which was inaugurated barely 2 months ago.

In Costa Rica, terrorism had been virtually unknown until March 1981 when a vehicle bearing three U.S. Embassy guards was blown apart. In June three Costa Rican policemen were shot down. This year an investigation by the police uncovered at least 20 terrorist cells of the Central American Party of Revolutionary Workers, one of which was involved in an attempted kidnapping in January of the Salvadoran businessman Roberto Palomo. Also uncovered was a "people's prison" well supplied with arms, food, and other stores. According to documents found during the investigation, the purpose of the terrorists was to undermine Costa Rica's democratic institutions. Two Salvadorans and one Costa Rican were arrested; they told police they had been given extensive training in Nicaragua and false identity documents.

New Cuban approach

Cuba's covert strategy for exporting armed revolution and terrorism is more sophisticated than Cuban efforts in the 1960s. The new Cuban approach no longer centers support solely on armed *focos* but combines support for revolutionary groups with propaganda, youth training courses, scholarships, and bilateral economic/technical assistance. Despite some flexibility in tactics, the mainspring of Cuba's policy remains the development of strong paramilitary forces in target countries like Colombia to provide the muscle for revolutionary groups regardless of the path to power they choose.

And now Nicaragua is collaborating in the attempt to impose new Cuban-style regimes in Central America. Such regimes are so incompetent economically and so repressive of individual liberties that their citizens will

see their only hope in flight, often to the United States. The rapidly growing number of Indian refugees—now more than 12,000—who have fled Nicaragua to Honduras are just the most recent manifestation of the despair which moves people to abandon their communities for safety elsewhere.

We know the human tragedy of refugee movements. We also know the enormous social and economic burdens they place on the societies which receive them. We ourselves have seen the crime, the skyjackings, the huge welfare costs and social tensions the Mariel migration brought to the communities of this country. For small countries in Central America or even Mexico the consequences could be too much to accommodate. The pressures can easily destabilize the weak, creating the chaos that gives revolutionaries new opportunities. Whether or not it is part of the design to export revolution, it at least serves that purpose.

Cuba's investment of energy, money, and agents would not be possible without Soviet help. Soviet assistance, now totaling well over $3 billion a year, equivalent to a quarter of Cuba's GNP, enables Cuba to maintain the second largest and the best equipped military force in Latin America and to channel significant resources to insurgencies and terrorism abroad. Cuba's new offensive since 1978 has been accompanied by ever-increasing Soviet arms buildup in Cuba including MiG-23/Floggers and 66,000 tons of supplies in 1981 alone. Having such a sophisticated military establishment enhances Cuba's ability to foster and export revolution.

Conclusion

We must be clear about Cuba. It is a Soviet surrogate. But it is not simply a Soviet surrogate. Its support for subversion derives from its own deeply based ideological conviction. It is a fundamental tenet of the Cuban revolution.

The Cuban leadership today is made up largely of the veterans who 23 years ago came to power through violent revolution. They have developed "armed struggle" into an ideological precept and way of life. Promoting "armed struggle" is not just a tactic of foreign policy, it is what reassures them that they are still revolutionaries.

This deep-seated drive to recreate their own guerrilla experience elsewhere is strengthened by hopes of creating allies and keeping Washington's attention focused away from Havana. Hoping that the United States will be domestically and internationally hamstrung on El Salvador, Cuba seeks to compound our problems by creating new ones—for example, in Guatemala or Colombia. This drive, however, makes Cuba increasingly prone to rash decisions and tactical mistakes and more willing to sacrifice the lives and resources of foreign guerrilla groups in operations that may prove disastrous to the guerrillas but advantageous to Havana.

Make no mistake: The Castro regime has made a business of violent revolution. Our response is also clear. We will not accept, we do not believe the countries of the region will accept, that the future of the Caribbean Basin be manipulated from Havana. It must be determined by the countries themselves.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 82-1690-T

RUTH WALD, ET AL., PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

AFFIDAVIT OF DENNIS M. O'CONNELL

I, Dennis M. O'Connell, hereby depose and say:

1. My name is Dennis M. O'Connell. I reside at 7509 Sweetbriar Drive, College Park, Maryland 20740.

2. I am the Director of the Office of Foreign Assets Control ("FAC"), a position I have held since August 10, 1980.

3. In that capacity, I am familiar with the interpretation, administration, and enforcement of the Cuban Assets Control Regulations ("the Regulations").

4. On April 20, 1982, FAC published in the *Federal Register* an amendment to section 515.560 of the Regulations, dealing with travel-related transactions. The effective date of the amended regulation was May 15, 1982.

5. Since April 20, 1982, members of my staff and I have responded to more than 300 telephone calls concerning the amended regulation. In many cases, persons simply wanted to confirm that they could continue to visit close relatives in Cuba and were told that transactions relating to such travel were authorized by general license. In other cases, the proposed transactions required a specific license, or there appeared to be some question whether transactions were authorized by the general license. In such cases, persons were invited to submit additional information to FAC in writing.

6. Since April 20, 1982, FAC has made written responses to approximately 45 letters concerning travel-related transactions. In approximately 25 cases, FAC either responded that transactions for the purposes described in the letter were authorized by the general license or issued special licenses authorizing the proposed transactions. Specific licenses have been issued in several cases for humanitarian reasons such as visiting fiances or friends incarcerated in Cuba and also for purposes of participation in sports or cultural events in Cuba. In certain other cases, additional information has been requested as to the purposes of travel, and no final determinations were made.

7. FAC's determinations as to whether any individual or group falls under the general license for "professional research" and "similar activities" are made solely on the basis of information provided to FAC by persons or groups requesting such determinations. Examples of persons for whom travel-related transactions have been licensed or determined to fall within the general license are individual researchers working on advanced academic degrees, doctors traveling to perform medical research in Cuba, and individuals whose travel was for purposes of exchanging research and ideas at a conference in Cuba of North American Marxist philosophers.

8. In approximately eight cases, FAC has informed the inquiring group or individuals in writing that transactions for the purposes described in the letter to FAC were not licensed, either in whole or in part. Among these groups was the George School (letter of denial dated June 7, 1982, Exhibit A). The George School's proposed study tour does not fall within any of the categories in the general license, and the School did not demonstrate any compelling humanitarian reason or other ground, such as participation in a cultural or athletic event, that would justify issuance of a specific license.

9. By letter of June 11, 1982 (Exhibit B), the Center for Cuban Studies ("the Center") was informed that

FAC would not specifically license its proposed interdisciplinary tour and did not regard it as falling within the general license. As described in the Center's letter to FAC of June 1, 1982 (Exhibit C), the proposed tour had a total of 98 prospective participants, identified only by name and, in some cases, a few additional details. FAC specifically informed the Center in its June 11 letter that it would examine any additional information pertaining to prospective participants who might individually be eligible for travel-related transactions under section 515.560 of the Regulations. FAC has already received more than 35 letters which appear to come from individuals interested in participating in the Center's proposed study tour. Of these, more than 20 individual cases have been determined to involve "professional research" or "similar activities" within the scope of section 515.560, and notification to these individuals by telephone has been accomplished or attempted. In approximately 13 cases, additional information is being sought. As of this date, no final decision has been made that an individual who is clearly identifiable as a prospective participant in the Center's interdisciplinary study tour falls outside the general license.

10. FAC is in the process of obtaining final interagency approval for an amendment to section 515.560 which would explain and clarify the meaning of the general license for "professional research" and "similar activities," expand the meaning of "close relative," and set forth a specific licensing policy concerning certain professional meetings, seminars, and conferences to be held in Cuba. I anticipate that this amendment will be filed with the *Federal Register* no later than next week.

11. The revised licensing policy governing authorized travel-related transactions involving Cuba (section 515.560) is part of a comprehensive trade and financial embargo against Cuba maintained by the United States since July 8, 1963. Section 515.201 of the Cuban Assets Control Regulations, issued under the authority of sec-

tion 5(b) of the Trading With the Enemy Act, prohibits a nearly all-encompassing range of import, export, banking, and other financial transactions between any person subject to the jurisdiction of the United States and the Government of Cuba or any business enterprise, other entity or individual defined as a Cuban "national" by the Regulations.

12. Since their inception, the Regulations have prohibited any payment or expenditure involving a transaction with Cuba or a Cuban national, except as licensed by Treasury's Office of Foreign Assets Control. Travel-related transactions have not been singled out for special prohibition in the Regulations. Rather, travel-related transactions have been among the very limited areas where licensing exceptions have been made. Even as revised, the general license in section 515.560 still authorizes travel-related transactions involving certain categories of travelers. This is in the context of a program of financial sanctions against Cuba that contains only narrowly limited exceptions.

13. One of the other areas where licensing exceptions have been made is described in section 515.559, a statement of licensing policy governing licensed import and export transactions with Cuba by U.S. subsidiaries. This exception was made for foreign policy reasons in order to avoid difficulties with foreign nations where the affiliates are incorporated. Under local law, such subsidiaries generally are regarded as nationals of their host countries. Accordingly, when in 1975 the Organization of American States determined that each member state would be free to pursue its own trade policy vis-a-vis Cuba, the United States decided to license non-strategic trade with Cuba by U.S.-owned or controlled foreign firms in countries which favored or permitted trade with Cuba.

14. However, the licensing conditions set forth in section 515.559 underline the foreign policy basis for the licensing exception. The overall U.S. embargo policy toward Cuba remains unaltered. The foreign subsidiary

must conduct its business with Cuba independently of its U.S. parent. The U.S. parent firm and its officers or employees cannot be involved in a licensed transaction in any way. In other words, the licensed activities must be conducted strictly offshore as if by a non-U.S.-owned foreign firm. No direct dealing with Cuba by a U.S. parent firm or office or by any person in the U.S. is authorized. Further, under the revised general license in section 535.560, no U.S. national, whether employed by the parent firm or the subsidiary, is authorized to engage in travel-related transactions with Cuba. (Prior to the revision, a U.S. national employee of the subsidiary, but not the parent, was licensed to engage in transactions involving travel to Cuba on the subsidiary's business.)

15. Licensed subsidiary trade with Cuba is not a net earner of foreign exchange for Cuba. In 1980 and 1981, Cuba incurred substantial trade deficits with U.S. subsidiaries in foreign countries, amounting to more than $270 million. In 1981 (Jan.-Sept.), of total licensed trade amounting to $73,847,319, only $10,660,376 constituted imports by U.S. subsidiaries for which Cuba earned revenues. In 1980, of a total of $302,234,526, imports accounted for $88,043,683. Accordingly, this two-way trade, while it permits Cuba to obtain certain products from U.S. subsidiaries (particularly grains), imposes net costs on Cuba in terms of expenditures of its foreign exchange reserves and, unlike tourism, it does not generate excess hard currency earnings that can be diverted for purposes inimical to U.S. interests.

16. The decision to narrow the general license for travel-related transactions grew out of a recent Executive Branch review of options for tightening the Cuban embargo announced publicly earlier this year by the Assistant Secretary of State for Latin American Affairs. Various alternatives were, and remain, under consideration. However, choices for increased economic sanctions are somewhat limited by the current breadth of the embargo. Available options include complete or partial withdrawal

of licensed relaxations of the embargo such as the 1977 removal of the restrictions on travel-related transactions.

17. The new licensing limitations are intended to reduce Cuba's hard currency earnings, particularly U.S. dollar earnings, from planned expansion of its tourist industry. Cuba is expanding its tourist facilities and promoting tourism for purposes of earning dollar exchange.

/s/ Dennis M. O'Connell
DENNIS M. O'CONNELL

Dated: June 29, 1982

[SEAL]

OFFICE OF THE SECRETARY OF THE TREASURY
Washington, D.C. 20220

Jun. 7, 1982

FAC NO. 96157

Dear Mr. Bourns:

This is in response to your letters of April 23 and May 21, 1982, concerning a proposal by the George School to send a group of students and teachers on a study tour to Cuba.

This Office administers the Cuban Assets Control Regulations which prohibit all unlicensed economic transactions in which Cuba has an interest. Section 515.560 of the Regulations sets forth a licensing policy which authorizes certain transactions on behalf of certain persons who wish to travel to Cuba. Persons subject to U.S. jurisdiction who have close relatives in Cuba, who are professionally engaged journalists and researchers, or who are government officials traveling on official business may visit Cuba without obtaining a specific Treasury license. All other persons, as individuals or in groups, who wish to travel to Cuba must obtain a specific Treasury license in advance. According to current licensing policy, only those persons with compelling humanitarian reasons or who are to participate in a recognized sporting or cultural event may receive a specific Treasury license.

We have considered the request of the George School under the general license for professional research or similar activities, and also, as requested in your May 21 letter, under the specific licensing authorization for humanitarian reasons. General interest study tours, such as the George School's proposed trip to Cuba, do not constitute "professional research" within the meaning of the new regulations. In addition, although you describe the trip as having educational and religious purposes and

state that it will promote dialogue between American participants and Cubans, such generalized benefits are not sufficient to bring the trip within the specific licensing authority for exceptions based on humanitarian grounds. Approval of applications for licenses to engage in transactions involving travel for such general purposes would be inconsistent with the Regulations' purpose of depriving Cuba of foreign exchange, and such applications are, therefore, denied. We sincerely regret any inconvenience that this new control may cause, but trust you will understand its rationale.

I hope this information will be helpful to you.

Very truly yours,

/s/ Dennis M. O'Connell
DENNIS M. O'CONNELL
Director
Office of Foreign Assets Control

Mr. David L. Bourns
Headmaster
George School
Newton, Pennsylvania 18940

cc: Congressman James K. Coyne
Congressman Robert W. Edger
Congressman Frederick W. Richmond
Congressman Frank R. Wolf

[SEAL]

OFFICE OF THE SECRETARY OF THE TREASURY
Washington, D.C. 20220

Jun. 11, 1982

FAC NO. 96248

Dear Ms. Levinson:

This is in response to your letter of June 1, 1982, concerning the Center for Cuban Studies' proposed interdisciplinary study tour in Cuba from July 16-August 15, 1982.

As you are aware, this Office administers the Cuban Assets Control Regulations, which prohibit all unlicensed economic transactions in which Cuba has an interest. Section 515.560 of the Regulations sets forth a licensing policy which authorizes certain transactions on behalf of certain persons who wish to travel to Cuba. Persons subject to U.S. jurisdiction who are traveling to visit close relatives in Cuba, to engage in professional research in Cuba, for purposes of certain news-related or film-making activities in Cuba, or to engage in official business may visit Cuba without obtaining a specific Treasury license. All other persons who wish to travel to Cuba must obtain a specific Treasury license in advance. Under current licensing policy, only those persons with compelling humanitarian reasons or who are to participate in public performances or exhibitions may receive a specific Treasury license.

We have considered the proposed study tour of the Center for Cuban Studies under both the general and the specific license authorizations. General interest study tours, even when the prospective participants are professionals in various fields, do not constitute "engaging in professional research" or "gathering news, making news or documentary films" under section 515.560. Moreover, although prospective participants may regard the tour as

educational and informative, such generalized benefits are not sufficient to bring the trip within the specific licensing authority for exceptions based on humanitarian grounds. Finally, we have received no information suggesting that the second category for which specific licenses may be granted, that pertaining to public performances and public exhibitions, is involved here.

Based upon information presented in your June 1 letter, it is the determination of this Office that the proposed interdisciplinary study tour does not fall within any of the general license categories. It is also our determination that issuance of a specific license would not be appropriate in this case. Approval of travel-related transactions involving travel for such general purposes would be inconsistent with section 515.560's purpose of limiting Cuba's foreign exchange earnings.

As you were informed by Marilyn L. Muench, Chief of Licensing, in her conversation with you June 4, it is possible that certain of the prospective tour participants individually are eligible to engage in travel-related transactions under the general license or a specific license. We would be pleased to consider any additional information which may be presented to this Office pertaining to such individuals.

I regret any inconvenience this new control may cause and trust this information will be helpful to you.

Very truly yours,

/s/ Dennis M. O'Connell
DENNIS M. O'CONNELL
Director
Office of Foreign Assets Control

Ms. Sandra Levinson
Center for Cuban Studies
220 East 23rd St.
New York, New York 10010

CENTER FOR CUBAN STUDIES

June 1, 1982

Dennis M. O'Connell
Foreign Assets Control Office
1331 G Street N.W.
Washington, D.C. 20220

Dear Mr. O'Connell:

The Center for Cuban Studies has scheduled a summer interdisciplinary study tour to Cuba, to extend from July 16 to August 15. The tour is intended for professionals—academics, writers and journalists, legal and health personnel, and others—for whom the Spanish language and an in-depth knowledge of Cuba is important, even necessary, to their work.

The program is organized to teach both Cuban Spanish and various aspects of Cuban culture, society, history, economics and politics to those enrolled in the summer course. The participants will live and study together for one month in Havana. Morning classes will be given in Spanish at three levels—beginning, intermediate and advanced—with an emphasis on Cuban literature in the advanced classes. These classes will be given five days during the week, i.e., the weekdays. Afternoon seminars will be given in the area of specialization of each tour participant, together with field trips. For this purpose, the people who are part of this interdisciplinary study tour are being divided into seven areas of specialization. They are:

1. Cuban Culture—film, music, dance, art, literature
2. Cuban Education—day care and primary schools, secondary schools, university education, worker-peasant schools, and special education for handicapped and disabled
3. Cuban Science, Medicine, Health Care—physical and mental health care, preventive programs, en-

vironmental concerns, scientific and research advances

4. Cuban Economics and Politics—organization of the Cuban economy, political structure (both Party and administrative), mass organizations
5. Cuban Social Relations—women, race, housing, the elderly, the family
6. Cuban Law—all aspects of the criminal justice system, including the courts, the Constitution, prisons, delinquency
7. Cuban History and Foreign Policy for Latin Americanists

These afternoon seminars will be given by experts in the different fields and visits will be made to relevant institutions. For example, in the cultural field, seminars will be given by writers Roberto Fernández Retamar and Cintio Vitier, filmmakers Tomas Gutiérrez Alea and Santiago Alvarez, composers Leo Brouwer and Harold Gramatges, artists Raúl Martinez and Mariano Rodriguez, art critic Adelaida de Juan, actor-directors Mario Balmaseda and Raquel Revuelta. Field trips will be made to Cubanacan, the art school in Havana; the Cuban National Ballet, both in rehearsal and in performance; the Cuban Film Institute to see films and talk with directors and actors; the theater companies, again both in rehearsal and in performance, and to the Cuban Writers and Artists Union.

The Center received over 300 applications for this study tour and we have specifically selected those persons whom this tour and these classes would help in their work. We excluded those who seemed to be applying only as "tourists," because the Center is intended to aid persons in their desire to deepen their knowledge and understanding of Cuba, and not to serve as a travel agent for tourists.

I have attached a list of those persons selected for the study tour and the subject area in which each will take seminars and will, in many instances, offer seminars. We have asked each participant to give at least one seminar in his or her area of specialization, as a way of sharing knowledge with Cubans in the same fields. Unless otherwise noted, all those connected with a university are either professors or are completing postgraduate studies.

While we believe that this study tour falls within the limits defined for a general license in Section 515.560(ii) of the Cuban Assets Control Regulations, i.e., "persons who are traveling for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities," should the Office of Foreign Assets Control consider that this Center study does *not* fall under the General License requirements, I would like you to consider this letter a request for a Specific License.

Because of the time element, we are most concerned to obtain a ruling from you as quickly as possible. When I spoke with Mr. Boudreau, he assured me that our application would be dealt with as expeditiously as possible. I look forward to hearing from you soon, and will call to make an appointment to discuss the tour with you.

Thank you very much.

/s/ Sandra Levinson
SANDRA LEVINSON
Executive Director

Enclosure: List of Tour Participants

cc: To each tour participant
Michael Standard, Esq.

LIST OF PARTICIPANTS ACCORDING TO MAJOR SUBJECT AREA

I. CUBAN CULTURE

1. Robert Achs, filmmaker, New York City
2. Eugene Adams, media specialist
3. Basha Alperin, musician, New York City
4. Suzanne Avellano, Dept. of Art History, Univ. of Calif./Santa Barbara
5. Ronald Balistrieri, Dept. of Comparative Literature, UC/Riverside
6. Susan Fanshel, filmmaker, New York City
7. Dr. Bruce Franklin, Dept. of English, Rutgers Univ., New Jersey
8. Lisa Frigand, grantmaking in the arts field, New York City
9. Roger Larson, filmmaker, New York City
10. Barbara Leckie, graphic designer, Washington, D.C.
11. Jacqueline Leopold, film producer, New York City
12. Dr. Jack Mitchell, Dept. of English, San Bernardino Valley College, San Bernardino, Calif.
13. Dr. Patty Lee Parmalee, writer, New York City
14. Judith Sobel, film editor, New York City

II. CUBAN EDUCATION

1. Paul Baizerman, teacher, P.S. 309K, New York City
2. Beverly Bickel, teacher-counselor for high school dropouts, La Alianza Hispana, Boston, Mass.

3. Jan Calloway, teacher of English as a second language, New York City Public High School
4. Miriam Carter, instruction assistant for learning disabled children Roxbury Community College, Roxbury, Mass.
5. Jennifer Charnovsky, bilingual kindergarten teacher, Los Angeles Unified School District
6. Kimberly Gerould, teacher of English as a second language, Somerville, Mass.
7. Susan R. Greenberg, bilingual education counselor, instructor to disabled children, Charles River Academy, Cambridge, Mass.
8. Dr. Cecilia Pollack, director, Intersensory Learning Center, Great Neck, N.Y.
9. Janice Rank, instructor in reading, English, psychology, San Bernardino, Calif.
10. Stephen Shapiro, Principal and social studies teacher, Satellite Academy High School, New York City
11. Eddison Skerrit, teacher, New York City public schools
12. Cheryl Sonnichsen, Dept. of International Development Education, Stanford University, Stanford, Calif.
13. Brad Stocker, teacher of English as a second language, Miami-Dade Community College, Florida
14. David Tanzer, Dept. of Mathematics, Univ. of Penna. (student)
15. Cynthia Terrell, Germantown Friends School (student, daughter of Huntington Terrell)
16. David K. Truscello, teacher of English as a second language, Roxbury Community College, Roxbury, Mass.

17. Claudia Raslavsky, mathematician, author, Teachers College consultant, New York City
18. Sam Zaslavsky, professor at Baruch College, New York City (ret.)
19. Clarence E. Wilkins, Upper School, Abington Friends School, Jenkintown, PA

III. CUBAN SCIENCE, MEDICINE, HEALTH CARE

1. Michael Carter, senior programmer, Univ. of Calif./Davis, Dept. of Agronomy and Range Science
2. Mary Driscoll, Director, Occupational Therapy Dept., Kennedy Memorial Hospital for Children, Boston, MA
3. Patricia Ferrand, County Solid Waste Coordinator, New Jersey
4. Dr. John Gliedman, Dept. of Psychology and Philosophy of Science, Empire State College, New York City
5. Deborah Howland, R.N., Boston City Hospital
6. Brenda Loew, Director of Community Energy Planning, Amherst, MA
7. Judith Powell, R.N., New York Infirmary, Downtown Beekman Hospital, New York City
8. Dr. Charles Roberts, psychiatrist, private practice, New Jersey
9. Dr. Charles Rosenbloom, psychiatrist, Morningside Clinic and private practice, New York City
10. Dr. Charles Wright, obstetrician, private practice, Detroit, MI
11. Mrs. Charles Wright
12. Lindsay Gillies, Data Base Administrator, Univ. of Mass./Amherst

IV. CUBAN ECONOMICS AND POLITICS

1. Dr. Philip Brenner, Dept. of Political Science, American University, Washington, D.C.
2. Dr. Michael Kearney, Dept. of Anthropology, teacher of Third World socio-economic development, UC/Riverside
3. Rosemary Potter, Dept. of Political Science, University of Wisconsin/Milwaukee
4. Kathleen Pritchard, Dept. of Political Science, Univ. of Wis./M
5. Carlotta Renwick, Accountant, CES Publishing Corp., New York
6. Dr. David Schwartz, Dept. of Economics, Albright College, Albright, PA
7. Dr. Thomas A. Sears, Dept. of Economics, Univ. of San Francisco
8. Dr. Huntington Terrell, Dept. of Philosophy, Colgate University, Hamilton, New York
9. Millie Thayer, teacher of social studies, Grant High School, Portland, Oregon
10. Penny Rubinfine, Center for Cuban Studies, New York City

V. CUBAN SOCIAL RELATIONS

1. Arthur Bassin, architect and urban planner, University of California/Santa Barbara
2. Gilbert Cadena, Dept. of Sociology, Univ. of Calif./Riverside
3. Lucille Flato, City of San Francisco Social Services Department
4. James Flory, Dept. of Sociology, Iver Hills Community College, St. Paul, MN

5. Jennifer Green, Dept. of Anthropology, Stanford, Univ., CA
6. Michael Hirsch, Dept. of Sociology, Univ. of Wisconsin/Milwaukee
7. Monika Lynne Hudson, public administrator, Sacramento, CA
8. Carole Nagengast, Dept. of Anthropology, UC/Riverside
9. Arline Prigoff, Jane Addams College of Social Work, Chicago, a Coordinator, West Side Chicago Parental Stress Services
10. Laurie Puretz, UC/Santa Cruz (student)
11. Ernestine S. Roye, social worker, Spence-Chapin Services to Families and Children, New York City
12. Dr. James Otis Smith, Dept. of Sociology, Univ. of Wis./Milwaukee
13. Jane Wood, housing and tenants organizer, New York City
14. Dwayne Wyatt, UCLA Graduate School of Architecture and Urban Planning

VI. CUBAN LAW

1. Emily Bass, Esq., Rabinowitz, Boudin, Standard, Krinsky & Lieberman, New York City
2. Haywood Burns, Esq., Director, Urban and Legal Studies, City College of New York
3. Maggie Cohn, National Jury Project Staff, Boston
4. Ethel Devine, court reporter, Brooklyn, N.Y.
5. Peter Joy, Esq., Clinical Legal Education Program, Case Western Reserve University School of Law, Cleveland

6. Emilie Nora Junge, Esq., U.S. Dept. of Labor
7. The Rev. David Patton, juvenile delinquency prevention program and social justice programs, California ,
8. Scott D. Pollack, legal assistant, New York City
9. Margarita Rosa, Esq., Rabinowitz, Boudin, Standard, Krinsky & Lieberman, New York City

VII. CUBAN HISTORY AND FOREIGN POLICY FOR LATIN AMERICANISTS

1. June Belkin, Center for Latin American Studies, Univ. of Pittsburgh
2. William Bigelow, Social Studies, Jefferson High School, Portland, Oregon
3. Shirley Braus, Latin American Studies, California State Univ., Los Angeles
4. Dr. Betty Broadhurst, Latin American Studies, Colorado State Univ.
5. Edward P. Casey, Latin American History, Leeward Community College, Pearl City, Hawaii
6. Audrey Cole, administrative assistant, Senator Lowell Weicker
7. Jackie Dooley, Bibliographer/Editorial Assistant, Hispanic American Periodical Index, Latin American Center, UCLA
8. Jane Franklin, Center for Cuban Studies/ *Cuba in Focus*, NYC
9. Naomi Friedman, Center for Cuban Studies, New York City

10. Dr. William Gaboury, Dept. of History, Southern Oregon State College, Ashland, Oregon
11. Susan L. Gregory, *Latin American Perspectives*, UC/Riverside
12. Dr. Muriel McAvoy-Weissman, Latin American History, Fitchburg State College, Mass.
13. Dr. Peter Ranis, Dept. of Political Science and History, York College, CUNY, New York City
14. Dr. Margarita Samad-Matias, Director, Latin American Studies Program, City College, New York City
15. Dr. Rosalie Schwartz, Latin American History, San Diego State University

The following participants are journalists, but each of them would also fit into the category assigned for those in the cultural field:

1. Margot Adler, National Public Radio/Neiman Fellow (Harvard)
2. Barbara Leon, writer-reporter
3. Norma Smith, radio producer, Pacifica Radio, Calif.
4. Martha W. Tabor, writer-photographer, Washington, D.C.
5. Robert Weil

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1690-T

RUTH WALD, MARIAN LOWE, ROSARIO MORALES, FRANCIS E. BRADLEY, REV. ALICE HAGEMAN, CUBA RESOURCE GROUP, ROBERT C. HOWARD, CENTER FOR CUBAN STUDIES, LINDA TURNER, PLAINTIFFS

vs.

DONALD REGAN, Secretary of the Treasury, JOHN M. WALKER, JR., Assistant Secretary of the Treasury, DENNIS M. O'CONNELL, Director, Office of Foreign Assets Control, GEORGE SHULTZ, Secretary of State, and ROLAND WILSON REAGAN, President of the United States, DEFENDANTS

PUERTO RICO OLYMPIC COMMITTEE and RAFAEL MORALES CUBANES, on his own behalf and behalf of the ASSOCIACION DE TURISTAS OLIMPICOS DE PUERTO RICO (ATOPRICO), and other Puerto Rico Sports Fans, INTERVENING PLAINTIFFS

PLAINTIFFS' OBJECTIONS TO MAGISTRATE COLLINGS' REPORT AND RECOMMENDATION ON MOTIONS FOR PRELIMINARY INJUNCTION

Pursuant to Rule 3(b) of the Rules For United States Magistrates for the United States District Court for the District of Massachusetts, plaintiffs object to Magistrate Collings' Report and Recommendation on Motions for Preliminary Injunction dated July 16, 1982 in that:

1. The Magistrate's Report on page 15 negates the 1978 amendment to the Passport Act, 22 U.S.C. 211(a) by holding it inapplicable where, as here, "the executive

has done nothing to 'designate' passports as being restricted for travel in Cuba." Report at p. 15. This position is at odds with the clear intent of Congress to prohibit the Executive from imposing area restrictions on American citizens' rights to travel abroad. Certainly when Congress stated, that the "freedom of travel" principle is sufficiently important that it should be a matter of law not dependent upon a particular Administration's policy," S. Rep. 95-842, 95th Cong. 2d Sess. at 14, it did not have in mind that this "important principle" could be negated merely by use of another statute to restrict travel. In enacting the 1978 amendment, Congress did not intend merely to shift the responsibility for regulating travel from the State Department to Treasury Department. Yet, it is precisely this conclusion that the Magistrate reaches in his one sentence discussion of this point. See also plaintiffs' brief, Point I.

2. The Magistrate incorrectly relies on *United States* v. *Fernandez-Pertierra*, 523 F. Supp. 1135 (S.D. Fla 1981) (Report at 17-18) as precedent for his holding that the President's actions here were authorized under the grandfather clause of Section 101(b) of Public Law 95-223. As pointed out in plaintiffs reply brief and at oral argument, the issue of the scope of the grandfather clause was never briefed or argued by either party in the *Fernandez-Pertierra* case and was dealt with only peripherally by Judge Kehoe.

3. The Magistrate's discussion of the legislative history of the International Economic Emergencies Powers Act (IEEPA) is faulty. Report pp. 18-21. While recognizing that only those authorities which were being exercised on July 1, 1977 were grandfathered, the Magistrate concludes that the power to regulate travel-related transactions to Cuba was being exercised as of that date. He reaches this conclusion by the twisted logic that the non-exercise of power is equivalent to the exercise of power.

The Magistrate's report distorts the undisputed facts. He states that "with respect to travel, since travel to

Cuba was regulated as of June 1, 1977, albeit in the form of allowing *most* travel, the President in 1982 had the power to change the extent of regulation of travel, . . . that is to regulate travel in a more restrictive matter." (emphasis added) Report at p. 19. This statement is simply wrong; the regulations as of June 1, 1977 (sic, July 1, 1977) permitted not "most" but *all* travel to Cuba. Prior to April 20, 1982, § 515.560 of the Cuban Asset Control Regulations stated that "all transactions ordinarily incident to travel to and from . . . and in Cuba" were authorized. The Magistrate has attempted to portray the situation as one in which travel to Cuba was being restricted as of July 1, 1977, with the only change being that now additional restrictions have been added.

In fact, as mentioned, above, all travel to Cuba was permitted as of July 1, 1977 with *no* restrictions. Now, for most United States citizens, travel to Cuba will not be just restricted, but banned with the threat of criminal penalties for those who violate the ban.

Thus, we have here not a mere change in the "particular" or "exact manner" in which power is being exercised as described by the Magistrate (Report at pp. 19, 21) but a substantial and quantitative change in the nature of the powers being exercised. The only way it can be said that the power to restrict travel was being exercised on July 1, 1977 is by reasoning that the non-exercise of the power is in fact its exercise. On page 20 the Magistrate says just that: "If the power is seen as the power to regulate travel-related transactions to Cuba, the fact that President Carter had just a month before, exercised his authority to amend the Cuban Assets Control Regulations to permit more travel to Cuba would be evidence that the power or authority to regulate travel to Cuba was already being exercised." First, as noted before, President Carter had exercised his authority not merely to permit "more" travel to Cuba but essentially to permit *all* travel to Cuba. By any common sense interpretation of that amendment, the President had deregulated travel

to Cuba. It makes a mockery of the English language to claim that a deregulation is in fact an exercise of the power to regulate.

Finally the Magistrate's reliance on the testimony of Leonard Santos to note that all powers conferred on the President by 5(b) of the Trading With The Enemy Act being exercised, as of July 1, 1977 is misplaced. It is not a relatively minor administrator whose opinion is important but the view of the subcommittee which considered it important to delete the section of the bill in the earlier draft which would have grandfathered in those powers which were conferred but not exercised. In fact, the Magistrate's entire discussion of the legislative history is fundamentally skewed by his improper reliance on administration witness rather than on congressmen's statements.

4. President Carter's amendment of the Cuban Assets Control Regulation in May 1980 to deal with the Mariel boatlift was not evidence that the additional powers not being exercised on July 1, 1977 could still be exercised by the President under the grandfather provision. Report at p. 22.

First, the Mariel regulations, as its position in the regulatory scheme clearly indicates, is an interpretation of 515.201 and not a new additional regulation. The Mariel regulations merely prohibited transactions connected with the transportation of a Cuban national to the United States, unless such national held a valid visa or was a returning resident of the United States. Presumably 515.201 always prohibited transaction incident to transporting Cuban nationals without a valid visa. All the Mariel regulations did was to clarify or interpret the general regulations.

Here we have not a mere interpretation but a dramatic change in the regulations. Until May 1982 all American citizens could travel to Cuba—now, most cannot.

Furthermore, even if the Mariel regulations were similar to those promulgated here, those regulations are not

indicative of congressional intent, but of the Executive's view. Unlike the situation presented to the court in *Zemel* v. *Rusk*, 381 U.S. 1, the Mariel regulations if relevant at all, do not present "an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved such power." 381 U.S. at 12.

5. The Magistrate used an incorrect standard for interpreting IEEPA. His report ignores the need to read the exceptions to IEEPA contained in the grandfather clause narrowly due to (1) the remedial nature of the statute; (2) the constitutional right being restricted and (3) the criminal penalties involved. Instead of placing the burden on the government to justify its intrusion on the citizen's fundamental right to travel, the Magistrate suggests placing the burden on the plaintiffs to make "an extraordinarily strong showing to succeed." Report at p. 23.

6. The Magistrate's Report refers to the plaintiffs' failure to demonstrate a protest from someone in Congress that the President was exceeding his powers under the "grandfather" clause as a "strong indication that the President's actions here were authorized by Congress. Report at p. 23. In any event plaintiffs know of no rule of statutory construction which would hold that it is a "strong indication" or for that matter any indication of congressional intent that members of Congress do not protest Executive action taken years after a statute is enacted. In fact, neither plaintiffs nor defendants made any showing before the Magistrate as to the present opinions of congressmen on this issue.

7. Finally, plaintiffs object to the Magistrate's finding that plaintiffs have not been irreparably harmed. As demonstrated in plaintiffs' reply brief, plaintiffs do not have to show that they will never be able to travel to Cuba to show irreparable harm. Their right to travel to Cuba will be irreparably harmed if they are not permitted to

travel there now. See plaintiffs' brief, Point V and reply brief, Point IV.

8. As to the intervening plaintiffs, the Magistrate is in error in finding that the harm to the government is greater than the harm to intervenors. The harm to the government is only a short delay in the implementation of their policy, the harm to plaintiff intervenors is, as the Magistrate found, irreparable. Certainly the harm to the government is not irreparable.

In summary, the Magistrate has ignored the intent of Congress as reflected in the 1978 Amendment to the Passport Act and IEEPA, the fundamental nature of the right being asserted by plaintiffs and the irreparable harm to be suffered by plaintiffs.

In making these objections, plaintiffs have merely summarized their argument in response to the Magistrate's report. Plaintiffs arguments are more fully elaborated in the brief and reply brief which were before the Magistrate.

CONCLUSION

For the reasons set forth in these objections as well as in plaintiffs' briefs, the Magistrate's Report and Recommendation should be rejected and motions for preliminary injunction granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1690-T

RUTH WALD, ET AL., PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

PUERTO RICO OLYMPIC COMMITTEE, ET AL.,
INTERVENOR-PLAINTIFFS

DEFENDANTS' OBJECTIONS, AND RESPONSE TO PLAINTIFFS' OBJECTIONS, TO MAGISTRATE'S REPORT AND RECOMMENDATION

Defendants Donald Regan, et al., submit this memorandum pursuant to the Court's Rules for United States Magistrates, Rule 3(b), to present their objections to the Report and Recommendation ("Report") filed by Magistrate Robert B. Collings on July 16, 1982, regarding plaintiffs' and intervenor-plaintiffs' motions for a preliminary injunction.

Defendants also submit this memorandum in response to Plaintiffs' Objections to Magistrate Collings' Report and Recommendation ("Plaintiffs' Objections"), filed July 21, 1982. Defendants submitted their response to intervenor-plaintiffs' objections in Defendants' Memorandum in Opposition to Intervenor-Plaintiffs' Second Petition for a Temporary Restraining Order, also filed on July 21, 1982.

Defendants rely generally upon their already filed memoranda, which fully and adequately set forth the background issues and defendants' contentions in this case. *See generally,* Defendants' Memorandum In Support Of

Opposition To Plaintiffs' Motion For A Preliminary Injunction ("Defendants' PI Memorandum"), the Affidavits of Dennis O'Connell and Myles R.R. Frechette submitted therewith, and Defendants' Supplemental Memorandum In Support Of Opposition To Motion For Preliminary Injunction ("Defendants' Supplemental Memorandum"). This memorandum is submitted merely to clarify several points possibly obfuscated due to the expedited course of the proceedings.

I. *Defendants' Objections*

Magistrate Collings' Report confirms defendants' construction of the "grandfather clause" in the 1977 amendments to the Trading With The Enemy Act ("Act"), and generally upholds the renewed restrictions on travel-related transactions with Cuba. Defendants are satisfied that Magistrate Collings' Report fully, fairly and correctly addresses the merits.

The report, accordingly, should be approved, and plaintiffs' and intervenor-plaintiffs' motions for a preliminary injunction should be denied. They have failed to show a likelihood of success on the merits of their claims. To grant relief would contravene and harm the public interest by making a serious assault upon the foreign policy of the United States to carry out and tighten an embargo against a declared adversary of the national interest.

Defendants would, however, clarify two points. First, the express intent and direct effect of the amendments to 31 C.F.R. § 515.560 are to restrict Cuba's income from persons subject to United States jurisdiction by reimposing controls, under the total embargo contained in 31 C.F.R. § 515.201 over any economic transactions with Cuba, over travel-related transactions. The renewed regulations are not directly aimed at the right of international travel, despite their indirect, albeit significant, impact on travel to Cuba. The renewed regulation of travel transactions accordingly, must stand or fall as an element of the President's general wartime and national emergency au-

thority under the Act over all species of economic relations with Cuba.

The renewed controls, in short, just are not a attack on the right to travel itself, despite plaintiffs' attempts to convince the Court otherwise. Defendants object, accordingly, to those portions of the Magistrate's Report that might be construed as viewing the renewed restrictions as directed at travel itself.

Second, defendants' position regarding the "grandfather clause" has two components possibly conflated in the Magistrate's Report. Defendants primarily contend that the grandfather clause permits the President to exercise all § 5(b) powers regarding those countries subject to a declared state national emergency on July 1, 1977, because the exercise of the President's power to declare an embargo was what Congress intended to grandfather. This construction of the clause is supported by the promulgation of the Mariel regulations, by their judicial enforcement in *Fernandez-Pertierra* over the same contentions now raised by plaintiffs, and most importantly, by a full and fair reading of the entire legislative history.

Defendants further contend, secondarily, that even if plaintiffs' view of the grandfather clause is correct, the President was exercising authority over travel-related transactions with Cuba on July 1, 1977. That exercise existed by virtue of the total prohibition of any economic transactions with Cuba, 31 C.F.R. § 515.201, as implemented by grant of a license for travel transactions with Cuba in § 515.560 (before 1982 amendments).

Defendants also object to Magistrate Collings' finding that the intervenor-plaintiffs have shown irreparable harm. The reasons for this objection are stated in Defendant's Memorandum In Opposition To Intervenor-Plaintiffs' Second Petition For A Temporary Restraining Order.

Defendants submit, accordingly, that subject to the above-stated qualifications, the Magistrate's Report should be fully approved and the motions for a preliminary injunction denied.

II. *Defendants' Response to Plaintiffs' Objections*

Plaintiffs' objections merely repeat arguments already contained in their previous memoranda and fully addressed by defendants and the Magistrate. To the extent that any further response is necessary, defendants make the following points.

First, regarding the Passport Act, it is inapplicable here. *See* Defendants' PI Memorandum at 16-18, and discussion *supra* at 3-4, regarding indirect effects on the right to travel. The legislative history of the 1977 amendments to the Trading With The Enemy Act shows that Congress knew that the Act included authority over travel-related transactions, *see* Defendants' PI Memorandum at 17, yet Congress took no steps to remove that authority. Indeed, it retained such authority in IEEPA while expressly restricting IEEPA authority over other constitutionally protected interests. *Id.* Congress, in amending the Passport Act in 1978 to limit the President's authority to restrict the use of passports, clearly should not be found *sub silentio* to have made an amendment to the Trading With The Enemy Act that it had rejected in 1977.

Second, the *Fernandez-Pertierra* case stands as a clear indication of the meaning of the language of the grandfather clause standing alone, and was therefore properly relied upon by the Magistrate. Plaintiffs claim that the language of itself proves their case; *Fernandez-Pertierra* refutes that claim. The legislative history, as Magistrate Collings found, only strengthens the court's Conclusion in *Fernandez-Pertierra*. Also, Magistrate Collings properly relied on the full legislative history, including the testimony of Leonard Santos, the Administration's spokesman clearly most familiar with the technicalities under review by Congress and here by the Court.

Third, plaintiffs fail to distinguish the Mariel regulations. Plaintiffs argue that the Mariel regulations merely "interpret" the general embargo of 31 C.F.R. § 515.201, and thus do not involve any new exercise of power. That

argument, however, is just what defendants say is true of the regulations under attack here. *See* discussion *supra* at 3-4.

Finally, plaintiffs mistake the nature of the congressional delegation of authority here by analogizing the President's authority to his authority under the Passport Act. Under the Passport Act, which was involved in *Zemel*, *Agee*, and all of the right to travel cases so heavily relied upon by plaintiffs, the President was asserting authority directly over the right to travel based merely upon a congressional delegation of power to issue passports in his discretion. The Supreme Court in those cases, accordingly, faced the question of where to place limits upon the extent of Executive power under a standardless delegation. The question was the extent of the delegation made, not what powers could be delegated.

Here, by contrast, § 5(b) of the Act expressly authorizes the President to "prohibit", "void," etc., economic transactions with countries such as Cuba that have been declared subject to an embargo. That authority is strong, but there is no doubt of its existence. Travel-related transactions unquestionably are a species of economic transactions, just as are the purchase of books, *see* discussion in Defendants' PI Memorandum at 19, and are no less covered by the Act for their constitutional coloration.

In sum, none of defendants' objections have merit. The Magistrate's Report should be approved upon the Court's *de novo* review of matters raised by the objections.

By their attorney,

WILLIAM F. WELD
United States Attorney

By: /s/ RA Child
RALPH A. CHILD
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I, Ralph A. Child, hereby certify that on this 26th day of July, 1982, I served the foregoing on the parties by mail addressed to Harvey B. Natchman, Leonard B. Boudin, Charles S. Sims, and Dorian Bowman.

/s/ RA Child
RALPH A. CHILD
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1690-T

RUTH WALD, MARIAN LOWE, ROSARIO MORALES, FRANCIS E. BRADLEY, REV. ALICE HAGEMAN, CUBA RESOURCES GROUP, ROBERT C. HOWARD, CENTER FOR CUBAN STUDIES, LINDA TURNER, PLAINTIFF

v.

DONALD REGAN, Secretary of the Treasury, JOHN M. WALKER, JR., Assistant Secretary of the Treasury, DENNIS M. O'CONNELL, Director, Office of Foreign Assets Control, GEORGE SHULTZ, Secretary of State, and RONALD WILSON REAGAN, President of the United States, DEFENDANTS

PUERTO RICO OLYMPIC COMMITTEE and RAFAEL NORALES CUBANES, on his own behalf and behalf of the Asociacion de Turistas Olimpicos de Puerto Rico (Atoprico), and other Puerto Rico Sports Fans, INTERVENING PLAINTIFFS

NOTICE OF APPEAL

NOTICE is hereby given that plaintiffs, Ruth Wald, Marian Lowe, Rosario Morales, Francis E. Bradley, Rev. Alice Hageman, Cuba Resources Group, Robert C. Howard, Center for Cuban Studies and Linda Turner hereby appeal to the United States Court of Appeals for the First Circuit from the Order denying plaintiffs' motion for a preliminary injunction entered in this action on the 22nd day of July, 1982.

DATED: New York, New York
August 17, 1982

/s/ Leonard B. Boudin
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1695

RUTH WALD, ET AL., PLAINTIFFS, APPELLANTS

v.

DONALD REGAN, ET AL., DEFENDANTS, APPELLEES

DECLARATION OF JOHN M. WALKER, JR.

John M. Walker, Jr., under penalty of perjury, declares and says as follows:

1. I am, and since August 3, 1981, have been, the Assistant Secretary (Enforcement & Operations) of the United States Department of the Treasury. One of my responsibilities is to supervise Treasury's Office of Foreign Assets Control.

2. This declaration is based upon information known and available to me in the performance of my official duties. I am making it to explain how this court's decision will injure the enforcement interests of the United States Government with respect to embargoes it has in place under Section 5(b) of the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. Section 5(b), to deny foreign exchange to Cuba, Vietnam, Kampuchea and North Korea.

3. Since 1963, pursuant to TWEA the United States Government has imposed a comprehensive embargo on trade and financial transactions between Cuba or Cuban nationals and persons subject to the jurisdiction of the United States. (Treasury issued the Cuban Assets Control Regulations (the "Regulations"), 31 C.F.R. Part 515, on July 8, 1963.) A major purpose of the embargo, which

includes a freezing of Cuban assets in the United States, has been to deny Cuba hard currency which it could use for purposes inimical to the interests of the United States. From the outset of the embargo, the Regulations restricted transactions relating to travel to Cuba by persons subject to the jurisdiction of the United States, just as they restricted other transactions. In 1977, Treasury issued a general license permitting certain travel-related transactions. This license, which was expressly subject to modification or revocation at any time, constituted a limited exception to the comprehensive embargo.

4. In late 1981, the United States Government became concerned that the Government of Cuba was increasing its support of insurgents in Central America and at the same time was initiating a program to increase its foreign exchange earnings by expansion of its tourist industry and increasing its appeal to tourists from the United States. The Government of Cuba demonstrated that it intended to regain the status it once enjoyed of having the highest tourist receipts of all Caribbean countries. According to State Department estimates, were Cuba to be able to return tourism to its 1958 position of prominence as a source of foreign exchange, within a few years it would earn, on a gross basis, $250-300 million each year. Net hard currency income would amount to $190-225 million per year, or 20% of Cuba's annual hard currency income, thereby making the business of catering to tourists, particularly U.S. tourists, a major source of hard currency support for the Cuban economy.

5. As set out in more detail in the Declaration of Assistant Secretary of State Thomas O. Enders dated June 3, 1983, the United States Government determined to forestall this development by restricting transactions relating to tourist travel to Cuba. It did not seek to prohibit transactions relating to all travel to Cuba by persons subject to the jurisdiction of the United States, but only transactions relating to those types of travel—tourist and business—which would be most likely to bene-

fit Cuba financially. No changes in the regulations permitting transactions concerning official, family, press and certain types of academic travel were contemplated, while transactions involving travel for special humanitarian purposes or for the purpose of attending public exhibitions or performances were to be permitted on a specific license basis.

6. Before these steps were taken, I, of course, had to be satisfied that Treasury had authority under law to reduce the scope of the license authorizing travel-related transactions with Cuba. I was well aware that TWEA had been amended on December 28, 1977, to authorize new embargoes only in time of war, and not in peacetime emergencies as it had done before. Act of December 28, 1977, Pub. L. No. 95-223. I was also well aware that the country embargoes in place under TWEA as of July 1, 1977, were "grandfathered" by Section 101(b) of Public Law 95-223. On July 1, 1977, the United States Government had in place comprehensive trade and financial embargoes with respect to transactions with Cuba, Vietnam, Kampuchea and North Korea pursuant to TWEA authority. At the same time, pursuant to that authority it was blocking assets of the People's Republic of China and certain European countries.

7. I understood that, since the 1977 amendment of TWEA, Treasury consistently had read the grandfathering provision as permitting adjustments—both liberalizing and tightening—in the controls concerning the four countries which were subject to full trade and financial embargoes. Not only did the plain language of Section 101(b) of Public Law 95-223 clearly permit such adjustments, but key parts of the legislative history manifested a Congressional intent that the President was to have adequate flexibility to continue to exercise controls under TWEA with respect to the four embargoed countries. For example, the Report of the House Committee on International Relations, which accompanied the bill for amending TWEA and enacting the International Emer-

gency Economic Powers Act ("IEEPA"), 50 U.S.C. Section 1701 *et seq.*, states as follows:

> Certain *current uses of the authorities* affected by H.R. 7738 are controversial—*particularly the total U.S. trade embargoes of Cuba and Vietnam.* The committee considered carefully whether to revise, or encourage the President to revise, such existing uses of international economic transaction controls, and thereby the policies they reflect, in this legislation. The committee decided that to revise current uses, and to improve policies and procedures that will govern future uses, in a single bill would be difficult and divisive. *Committee members concluded that improved procedures for future use of emergency international economic powers should take precedence over changing existing uses.* By "grandfathering" existing uses of these powers, without either endorsing or disclaiming them, H.R. 7738 adheres to the committee's decision to try to assure improved future uses rather than remedy possible past abuses. (H.R. Rep. No. 459, 95th Cong., 1st Sess. 9-10 (1977). Emphasis added.)

Thus, the Committee appeared to have intended to "grandfather" not specific regulations relating to Cuba, but rather what it described as the "total trade embargo" of Cuba. This same general intention is manifested elsewhere in the same report:

> . . . exercises of emergency powers under section 5(b) which are currently in progress should be *generally exempted* from the provisions of the new statute. . . . Current uses of section 5(b) should be considered individually, on their merits, in separate legislation. The purpose of the new statute should be to set forth authorities and procedures for future emergency situations. (H.R. Rep. No. 459, 95th Cong., 1st Sess. 11 (1977). Emphasis added.)

8. After the 1977 amendment of TWEA, Treasury's administration of the embargoes on the four countries was based on the premise that the grandfathering provision permitted flexibility in the issuance of new regulations. For example:

—In March 1979, Treasury amended the Regulations (Section 515.205), as well as the Foreign Assets Control Regulations (31 C.F.R. Section 500.205) and the Foreign Funds Control Regulations (31 C.F.R. Section 520.05), to impose a new requirement that certain blocked assets be held in interest-bearing accounts.

—Also in March 1979, pursuant to a request by the Government of the People's Republic of China after it had initialed a claims settlement agreement with the United States Government, Treasury issued a regulation which provided that, except upon certain conditions, no specific license would be issued to authorize the transfer of blocked property, pursuant to State law, to the abandoned property agency of a State (31 C.F.R. Sections 500.561 and 515.554).

—In May 1980, Treasury issued a new regulation, Section 515.415, which made clear that a variety of transactions related to transportation of Cuban nationals not holding proper U.S. visas was prohibited under Section 515.201 of the Regulations. The regulation was issued in response to the Cuban Government's arranging for large numbers of Cubans, including criminals and mentally ill persons, to come to the United States by means of the Mariel flotilla.

Neither the Congress nor members of the public challenged Treasury's authority to issue any of these new regulations pursuant to the "grandfathering" provision.

9. Indeed, the General Accounting Office (GAO), an arm of the Congress, also indicated that the embargo authority should be interpreted in a dynamic and flexible manner. In November 1980, the GAO issued a report, GAO/ID-81-01 (November 14, 1980), which, among other things, noted with approval Treasury's 1979 regulation

requiring, for the first time, private holders of blocked assets to pay interest on the assets. The report also recommended that Treasury go further and institute new procedures to verify the location of blocked assets. Such procedures would include taking a census of blocked assets and imposing new recordkeeping requirements on holders of blocked assets. To do this Treasury would have to issue new regulations. (Treasury, to implement this recommendation, is in the process of issuing new regulations, which are now at the Office of Management and Budget for clearance.) Nowhere in the GAO report is there any suggestion that Treasury lacks the authority under TWEA to impose the interest requirement or to implement the recommended new procedures. GAO obviously was of the view that Treasury has the necessary authority under TWEA.

10. It was my view that there are a number of significant, practical reasons why Congress intended existing embargo programs not to be disturbed and the authority of the President in administering those programs not to be impaired. Any embargo must be refined and adjusted from time to time for various reasons, including efforts of the embargoed country or those who would trade with that country to exploit weaknesses and loopholes in embargo restrictions. If invocation of IEEPA authority were required for every modification of "grandfathered" embargo program, the administration of that program, partly under TWEA authority and partly under IEEPA authority and procedures, would be most awkward. Similarly, if the President were in negotiations with a country against which a TWEA embargo had been imposed and wished to relax one type of sanction and impose another against that country (either simultaneously or later, upon the nonfulfillment of certain conditions), it would be anomalous for him to be required to declare a new national emergency before he could make the changes in the sanctions. Indeed, the situation might not support the declaration of a new national emergency and hence no

changes might be possible. Even more anomalous would be a requirement that a new national emergency be declared with respect to a country with which the United States had concluded a claims settlement agreement and for which the United States had to promulgate a new regulation forcing a holder of blocked properties to allow them to be transferred to the other country (as the United States did in the Iranian settlement).

11. I also recognized the significant foreign policy implications which the United States Government must consider before it could declare a new national emergency pursuant to IEEPA with respect to Cuba or any of the embargoed countries. (These had been recognized by the Executive Branch and by members of Congress at the time the "grandfathering" issue was being considered in 1977. In Congressional hearings, Treasury officials explained the foreign policy reasons why the Executive Branch sought to avoid having to declare a national emergency, and, in response, the Subcommittee Chairman said that he would not argue that the President should be expected to declare, for the first time, a national emergency with respect to Cuba.) *Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations*, 95th Cong., 1st Sess. 188-191 (1977).

12. In considering the reinstitution of controls on some travel-related transactions in 1982, I also concluded that the prohibitions on certain types of transactions relating to business and tourist travel in order to deny Cuba foreign exchange had the same fundamental character as other prohibitions on financial transactions which are the very heart of Treasury's general program of barring transactions with Cuba or nationals thereof. These basic prohibitions covering both travel-related and nontravel-related transactions are set forth in Section 515.201 of the Regulations, which has been in continuous effect since 1963. (A copy of Section 515.201 is attached hereto.)

13. In fact, travel-related transactions were being carefully controlled under the Regulations as of July 1, 1977. On March 29, 1977, Treasury issued a general, but by no means unlimited, license (Section 515.560 of Regulations) authorizing transactions "ordinarily incident" to travel to, from, and in Cuba. On May 18, 1977, in part in response to inquiries from travelers and the travel industry as to which types of transactions were authorized (*e.g.*, chartering a vessel and arranging hotel accommodations), Treasury amended the general license. The amendment made clear that a variety of transactions involving travel (*e.g.*, arranging charter tours, processing credit cards and selling passage on a foreign carrier) fell within the Section 515.201 prohibition, but were licensed pursuant to Section 515.560. Had Section 515.560, as originally published, been intended to be a simple revocation of all controls on travel-related transactions, the detail and certain qualifications provided in the May 18, 1977 amendment would have been unnecessary. The fact that travel-related transactions were covered by the Regulations was made clear to the Subcommittee on International Economic Policy and Trade of the House International Relations Committee when it considered the grandfathering issue. In testimony on June 13, 1977, concerning that issue, Mr. Leonard Santos, a Treasury expert, specifically stated that TWEA authorities involving travel to Cuba were being exercised at that time.

> Mr. Majak. . . . But there are other authorities being exercised with regard to Cuba and Vietnam.
>
> Mr. Findley. Would you list those?
>
> Mr. Santos. They are essentially transaction control regulations to the extent that the transaction involves a transfer of assets, it would involve the travel to those countries and the exchange of goods. Those are the powers being exercised under 5(b), and this is considerably more extensive than the freezing of a bank account or a piece of property. Emergency Control Hearings, *supra*, at 215.

14. I thought it very significant that, in order to cut back on the license authorizing transactions related to tourist and business travel to Cuba in 1982, the step that was required was not a new prohibition in the Regulations, but rather a mere modification of the general license issued in March 1977 for such transactions. In the Iranian assets context the previous year, the Supreme Court in *Dames & Moore* v. *Regan*, 453 U.S. 654, 673 (1981), held that the President had authority to withdraw a general license for attachments. The Supreme Court's holding placed great importance on the fact that, by its terms, the general license was expressly subject to amendment, modification or revocation at any time. On July 1, 1977, the general license for transactions related to travel to Cuba was expressly subject to those identical conditions.

15. Thus, restrictions on travel-related transactions were always an integral part of the United States' embargo on Cuba, and, in fact, on July 1, 1977, those transactions were being regulated and subjected to a number of restrictions, by means of a general license. The April 20, 1982 modification of the general license was neither an entirely new form of embargo nor even an expansion of an existing embargo.

16. For the reasons set out above, in which the staff of the Office of Foreign Assets Control fully concurred, in March 1982, I viewed as entirely appropriate and legal the modification of the provisions of the general license concerning transactions related to tourist and business travel to Cuba. This modification served to cut Cuba off from a source of a significant amount of foreign exchange while it enabled official, family, press and certain types of academic travel, as well as travel fully paid for by persons not subject to the jurisdiction of the United States, to continue.

17. I am extremely concerned that the Court's decision will seriously impair this Administration's ability to implement its policy with respect to Cuba. By its narrow

interpretation of the grandfathering provision, the decision will also leave in doubt Treasury's ability to deal with the other three countries which are subject to embargoes under Section 5(b) of TWEA and with transactions other than those relating to travel. This could prevent the United States Government from responding adequately to positive or negative developments in the United States' relations with those four countries. The decision could be used as a basis for disputing the validity of certain other changes in the assets control regulations —not related to travel—made since 1977, as well as changes that may be made in the future in those regulations.

18. While not everyone in the Congress has agreed with the Administration's policy in modifying the general license in 1982, at no time has anyone in Congress raised a question—by letter, in hearings or by other means—as to Treasury's authority to do so.

19. Congress did not intend to affect existing embargoes against Cuba, Vietnam, Laos and Kampuchea in "any way," according to a statement on the floor of the House by Chairman Bingham of the House Subcommittee (the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations) which prepared the TWEA grandfathering provision. 123 Cong. Rec. 12559 (1977). Similarly, when he signed H.R. 7738 into law on December 28, 1977, President Carter indicated that his understanding was the same as that of Chairman Bingham:

> Enactment of the bill will not affect embargoes now being exercised against certain countries . . . (Statement on signing H.R. 7738, Public Papers of the President, 1977, Book II, p. 2186.)

This Court's decision, contrary to the intent of Congress and the understanding of the Executive, does affect existing embargoes implemented under TWEA authority in a most significant and, indeed, harmful way.

I declare, under penalty of perjury, that the foregoing is true to the best of my knowledge and belief.

/s/ John M. Walker, Jr.
JOHN M. WALKER, JR.
Assistant Secretary
(Enforcement & Operations)

Executed on June 3, 1983
Washington, D.C.

SUBPART B—PROHIBITIONS

§ 515.201 Transactions involving designated foreign countries or their nationals; effective date.

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated under this part, or any national thereof, or such transactions involve property in which a foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such propery, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) or (b) of this section is hereby prohibited.

(d) For the purposes of this part, the term "foreign country designated under this part" and the term "designated foreign country" mean Cuba and the term "effective date" and the term "effective date of this section" mean with respect to Cuba, or any national thereof, 12:01 a.m., e.s.t., July 8, 1963.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1695

RUTH WALD, ET AL., PLAINTIFFS, APPELLANTS

v.

DONALD REGAN, ET AL., DEFENDANT, APPELLEES

DECLARATION OF THOMAS O. ENDERS

Thomas O. Enders, under penalty of perjury, declares and says as follows:

1. I am a career Foreign Service Officer in the Foreign Service of the United States. In my present assignment I am the Assistant Secretary of State for Inter-American Affairs in the Department of State. I have held that office since June 23, 1981.

2. As Assistant Secretary of State for Inter-American Affairs, I am familiar with United States policy in Latin America and the Caribbean. I am responsible for implementation of U.S. foreign policy in the region, under the direction of the President and the Secretary of State.

3. I make this declaration, which is based upon information known and made available to me in the performance of my official duties, in order to explain the foreign policy interests which continue to be involved and to show the injury to our foreign policy interests that would result if an injunction against enforcement of certain regulations concerning criteria for licensing transactions related to travel to Cuba were to be upheld.

4. I have read the Declaration of Myles R.R. Frechette, filed with United States District Court for the District of

Massachusetts in 1982, in connection with Civil Action File No. 182-1690-T (see JA 102-104). The Declaration of Mr. Frechette, who was then Director of the Office of Cuban Affairs in the Department of State's Bureau of Inter-American Affairs, set forth the reasons why the regulations at issue were adopted to serve important foreign policy interests of the United States with respect to Cuba. I endorse the statements made by Mr. Frechette in that Declaration and believe that they continue to represent an accurate statement of United States policy and the facts underlying that policy.

5. It is the longstanding policy of the United States and that of President Reagan to promote the development of democratic government in Latin America and to contribute to the economic and social well-being of the region through the encouragement of free institutions. It has been and remains a principal objective of the Government of Cuba to stimulate and support the overthrow of non-Communist governments in the Western Hemisphere and to replace them with Marxist-Leninist regimes acceptable to Cuba. Cuban success would be contrary to the national interests of the United States. In view of the intensity of the conflict which these Cuban efforts have helped to generate in Central America and elsewhere in the region, this Administration has maintained and strengthened measures to suspend trade with Cuba which are continued pursuant to the Resolution adopted by the Sixteenth Meeting of Consultation of Ministers of Foreign Affairs, acting under the Inter-American Treaty of Reciprocal Assistance (ITAR), the "Rio Treaty", on July 29, 1975.

6. Since 1960 it has been a major objective of United States foreign policy with respect to Cuba to deny the Cuban Government the financial means for conducting a foreign policy of violence against friendly third countries, dedicated to undermining the security interests of the United States. For that reason the United States Government adopted extensive restrictions on trade with Cuba,

including transactions related to travel, which was consistent with Resolution VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs acting under the ITAR, on January 31, 1962, and with Resolution I of the Ninth Meeting of Consultation of Ministers of Foreign Affairs, July 22, 1964, basing its measures on the authority of the Trading with the Enemy Act. The criteria for licensing transactions related to travel to Cuba then adopted were subsequently relaxed in 1977 as part of efforts by the Carter Administration to improve bilateral relations with Cuba. Travel, however, remained within the scope of general and specific licensing authorities exercised under the Trading with the Enemy Act. The criteria for issuing licenses for transactions related to travel were tightened again in 1982 because the conduct of Cuba had resulted in a deterioration, rather than an improvement, in bilateral relations, and because Cuba had vigorously renewed efforts to overthrow non-Communist governments of the region by the use of subversion and violence.

7. The objective of the tightening in May 1982 of licensing criteria on transactions related to tourist and general business travel to Cuba was not to prevent travel. Rather its purpose was to deny Cuba the convertible currency income which would otherwise could have been generated by development of tourism from the U.S. on a commercial scale, income which would then have become available for the advancement of Cuban policy contrary to the national interests of the United States.

8. The development of the tourist industry in Cuba was undergoing major expansion during 1981 and early 1982, and was intended to provide Cuba with a growing and important revenue flow which could in a relatively short period of time have become the second most important source of convertible currency for Cuba. The U.S. Government had become aware of Cuban plans greatly to expand tourism from this country. The Director for U.S. Affairs of the Cuban National and Inter-

national Tourist Enterprise, (CUBATUR) had requested visas for December, 1981 and January, 1982 visits to New York and Miami to meet 30-40 American travel agents for the purpose of promoting tourism to Cuba. The visa was denied because the purpose of the travel, to promote trade in tourist services, was contrary to U.S. policy and therefore prejudicial to the national interest. The U.S. Government was also aware of Cuban plans to host a Conference of International Travel Agents, which in fact was held in Havana June 8-12, 1982, attracting 670 delegates, representing 195 tour agencies, from 23 countries including the United States. The American Society of Travel agents had also inquired on behalf of Cuba whether Cuba could mount an exhibition promoting travel to Cuba at the Society's 52nd World Travel Congress in Miami, October 10-16, 1982. Following the relaxation of licensing criteria on travel-related financial transactions in 1977, Cuba began to develop plans for exploiting the U.S. tourist market as a significant source of convertible currency. One objective was development of a tourism complex on Cayo Largo and possibly on two other cays with fresh water available. Cayo Largo was to be a "free port", isolated from the rest of Cuba and staffed by selected personnel. There were to be gambling casinos and special attractions not available elsewhere in the country. In all, the 1981-85 five year plan called for inaugurating 22 new hotels with 2,800 rooms and recovering or improving an additional 6,900 rooms. Legislative Decree 50, an exceptional measure for a communist country, authorized Joint Ventures with 49 percent, or even more, foreign ownership. It was intended to attract foreign hard currency investments primarily in tourist-related infrastructure, and there were to be promotional campaigns in primary markets, especially the U.S.

9. There were other indications of Cuba's intention to promote tourism as a major industry. The primary source of this projected increase was to have been the United States. The restrictions on financial transactions related

to tourism and general business travel in May 1982 were intended to forestall this development and to prevent Cuba from developing a major source of foreign currency.

10. While tourism has not been an important earner of foreign exchange for the Castro Government in Cuba, tourism was a significant revenue source prior to 1958 and could be again. According to hearings before the Subcommittee on Interstate and Foreign Commerce, House Interior Committee, March 28, 29, 30, and April 11, 12, 1961, in 1958 Cuba earned $37 million from travellers from the United States alone, equal to about two percent of its gross national product and almost four percent of foreign exchange earnings. It then had the highest tourism income of any country in the Caribbean. The tourist trade was Cuba's second largest industry, and travel from the United States was easily the largest component of that industry. The proximity of the United States along with the size and affluence of its population makes it by far the key market for Cuba. This was recognized by the U.S. Government in 1963, and the tourist trade was accordingly suspended in connection with the imposition of other economic restrictions.

11. Cuba enjoys a significant advantage over free world countries competing with it for the U.S. tourist market. Cuba, itself heavily subsidized by the USSR, can subsidize tourism, offering low prices in the interest of attracting convertible currency. This would enable Cuba to compete to its advantage on unfair terms with other countries in the region for the U.S. tourist market. Convertible currency is the focus of U.S. economic measures because it is susceptible to U.S. efforts and because, while only 20 percent of Cuba's foreign exchange earnings are in hard currencies, the importance of these earnings is far in excess of their nominal value, because Cuba uses convertible currencies to buy goods critical to the efficient operation of its economy, such as machinery and transport equipment for key industries. Premier Castro specifically confirmed this analysis in a speech on July 26, 1982.

12. Cuban data show that in 1979 there were 159,440 tourist visits, earning Cuba 71.5 million pesos. This was cut in half, to 79,518 earning 31.6 million pesos in 1980 by unilateral Cuban action because most of those travelling were Cuban-American citizens and residents of the United States, and the major influx of affluent, free former residents was causing social instability among the Cuban populace. Anxious, however, to earn tourist dollars, Cuba sought to devise a strategy which would discriminate against politically unacceptable citizens and residents of this country who were of Cuban origin in favor of politically acceptable tourists. In effect, Cuba sought to discriminate against a class of Americans because of their national origin, yet earn income from other Americans.

13. As noted above, the purpose of tightening licensing criteria in May, 1982 was not to prevent travel to Cuba. It was recognized that certain persons would have legitimate need to expend funds in connection with such travel and such persons, therefore, remained under general license. The largest such group consisted of persons travelling for the purpose of family reunification; Government officials, journalists, sports and artistic travellers and researchers were others authorized under general license to expend funds. A further refinement, based on the objective of denying income to Cuba, authorized under general license all travel fully hosted by the Cuban Government or other Cubans.

14. Travel statistics show that imposition of these measures has not prevented travel to Cuba, which in fact has increased rather than diminished since their effective date of May 15, 1982. However, the pattern indicates that tourism as a component of travel was reduced. There was about an 18 percent increase in tourist travel to Cuba during January-March, 1982 compared to the same period of 1981. This was prior to the change of licensing criteria. However, the last quarter of 1982, October through December, shows a drop of about 45 percent compared to the same quarter in 1981. The measures there-

fore appear to have denied to the Cuban Government the increased revenues which it would otherwise have earned had the controls had not been enacted. Cuban efforts to redevelop tourism as a major industry, have largely been thwarted and the availability of convertible currency needed to buttress Cuba's foreign policy has thereby been reduced.

15. Since publication of the 1st Circuit decision of May 23, 1983, the Cuban government appears to have reinitiated efforts to promote U.S. tourism to Cuba. One indication was a May 27, 1983 approach to this Department by Mexicana de Aviacion expressing interest in providing charter aircraft to HAVANATUR, a Cuban government agency, for weekly tours from Miami to Havana. Another was the expression by a Texas operator of tours to Cuba, to the Treasury Department, of the intent to begin again offering tours in cooperation with Cuban authorities.

16. If the injunction against application of the Department of the Treasury regulations is permitted to stand, serious damage could result for U.S. foreign policy interests in the Caribbean and Central America. The resultant flow of convertible currency would assist Cuba in the conduct of its foreign policy at a time when Cuba is aggressively engaged in attempting the overthrow of democratic governments in the region which are friendly to the United States.

17. Accordingly, the regulations serve important foreign policy interests of the United States. An injunction against their application would substantially harm these interests, rendering encouragement to the Cuban Government and contributing to its foreign policy objectives.

I state under penalty of perjury that the foregoing is true and correct.

/s/ Thomas O. Enders
THOMAS O. ENDERS

Executed on June 3, 1983
Washington, D.C.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

DONALD REGAN, ET AL., APPLICANTS

v.

RUTH WALD, ET AL.

DECLARATION OF JAMES H. MICHEL

JAMES H. MICHEL, under penalty of perjury, declares and says as follows:

1. I am James H. Michel, Acting Assistant Secretary of State for Inter-American Affairs. I am responsible for the implementation of United States foreign policy with respect to Cuba, Central and South America, and the Caribbean region, under the direction of the President and the Secretary of State.

2. I make this declaration, which is based upon information known to me, to explain the adverse consequences of allowing a preliminary injunction against enforcement of certain Treasury Department regulations concerning licensing of transactions related to business and personal travel to Cuba to take effect in the First Circuit in the case of *Wald* v. *Regan*, No. 82-1695, and to remain in effect even for a short time.

3. It is the long-standing objective of the United States and the intention of this Administration to influence the Government of Cuba to cease its unacceptable behavior internationally and towards the United States. In particular, it is a primary objective of this Administration to deter Cuba from attempting to destabilize the Central American and Caribbean region. A central source of

leverage the United States has over Cuba lies in the power of the United States to prohibit persons subject to U.S. jurisdiction from engaging in various economic activities with Cuba or its nationals that would benefit Cuba. This is consistent with decisions taken under the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and congressional declarations. The individual regulations are intended to have a particular effect on Cuba, e.g., restricting its access to hard currency, in part to constrain its ability to finance revolutionary movements in Central America and the Caribbean Region, and to dissociate the United States from contributing to such Cuban adventures.

4. This program, as implemented by comprehensive regulations issued under the Trading with the Enemy Act (TWEA), has been maintained for twenty years. During this period, this regulatory scheme has proven to be a flexible and essential instrument of United States foreign policy. It enables the Executive to respond promptly to Cuban actions. In addition, through fine-tuning of the regulations, the scheme has served to buttress U.S. diplomatic initiatives.

5. This government's Cuba policy can only succeed if the Cuban Government is persuaded that the consistency of U.S. policy and its implementation will be maintained in the face of Cuba's continued intransigence, and that modification of unacceptable conduct is the sole way to effect favorable change in our bilateral relations. For the past twenty years, the Cuban Government has had to confront and consider the diplomatic fact that the United States could respond to Cuban misbehavior swiftly and flexibly through the use of TWEA authorities. For twenty years, the Executive's consistent and unambiguous ability to act under TWEA has been a fact of independent foreign policy significance. Issuance of the First Circuit's mandate would undercut this fact by casting doubt on the Executive's continued ability to use TWEA authorities even beyond the particular restrictions on financial

transactions incident to certain types of travel which are immediately at issue.

6. The utility of these TWEA authorities has been demonstrated in the actual conduct of U.S. foreign policy. For example, in 1977, the United States issued a general license for transactions related to travel to Cuba (which had previously been prohibited) in the hope that this effort to improve relations would lead to some reciprocal action by Cuba. In 1982, it was clear that Cuban conduct had not changed and that Cuba was in fact increasing its efforts to overthrow governments in the region. For this reason, the United States decided to place limitations on the general license for transactions related to commercially-significant travel to Cuba, i.e., business and tourist travel. However, these limitations were tailored to give Cuba incentives to permit other types of travel for humanitarian and academic purposes, such as family reunification visits. (When tourist travel was allowed under the general license, Cuba limited these visits.) TWEA authorities were also critical in responding to the actions of the Cuban Government which resulted in the 1980 Mariel boatlift. A new regulation was promulgated to prohibit certain transactions in connection with the transportation of undocumented Cuban aliens to the United States.

7. While the United States would seek to limit the effect of the appellate decision on the licenses at issue to the extent possible, pending a definitive resolution of the underlying legal questions, issuance of the mandate will engender considerable uncertainty among the law-abiding public. Some will immediately seek to travel to Cuba. Others will conclude that the entire embargo program is eroding and that the post-1977 regulations may be ignored. Already we are aware of cases in which persons have stated their intent not to comply with other regulations concerning commercial transactions on the basis of this decision. This public perception will give rise to a serious enforcement problem, and will undoubt-

edly reduce the level of voluntary compliance on which the program has depended in large part. We expect Cuba to exploit this public perception almost immediately, as it has in past cases when it perceived that the U.S. was having difficulties in maintaining respect for U.S. laws. For example, in 1980, as soon as Cuba realized that a few U.S. boat operators who had brought undocumented persons from Cuba were not being successfully prosecuted, it quickly arranged the departure of thousands of Cuban nationals to the U.S. from Mariel harbor. Cuba is likewise capable of establishing rapidly a tourism program to maximize economic benefits from travel permitted by the court's decision. Any additional amount of hard currency is important to the Cuban economy to help meet short-term needs. In addition, Cuba would have the opportunity of making business and other contacts which would undercut the effectiveness of other portions of the regulations which these restrictions were designed to complement.

8. The perception of the Cuban Government that the ability of the United States to rely on its law enforcement authority is suspect will harm U.S. foreign policy interests. The United States is engaged in a number of diplomatic initiatives with Cuba in which legal controls are a factor. For example, the United States has asked Cuba to accept the return of certain persons who had left during the Mariel boatlift. We have informed Cuba that once these persons have been returned, the U.S. would be prepared to relax certain immigration controls under U.S. law. If Cuba is encouraged to conclude that it need not bargain for advantageous changes in U.S. legal controls and that litigation could successfully impede implementation of U.S. policy, such initiatives would be undercut.

9. The Executive has no alternative to the use of TWEA authorities which would achieve the same foreign policy goals. Invoking IEEPA, with its attendant declaration

of a national emergency and requirement of a Presidential assertion of "an unusual and extraordinary threat" to the United States, 50 U.S.C. § 1703(b)(2) (Supp. II 1978), is an act with distinct foreign policy significance with major international implications beyond the U.S. relationship with Cuba. The decision to use grandfathered TWEA authorities rather than to invoke IEEPA was based on the Executive's determination of the source of authority that would best serve the foreign policy interests of the United States. Constraining the Executive's choice of authorities, in the absence of a definitive resolution of the underlying legal issues involved, would therefore disserve these interests.

10. The United States is continually reviewing the effectiveness of the implementation of its policies with respect to Cuba. New diplomatic developments could call for immediate refinements in the regulatory structure. Allowing the mandate to issue would cloud the effectiveness of any new initiatives promulgated under TWEA. Therefore, as a practical matter, the United States would be unable to take actions to implement its Cuban policy which are untainted by perceptions of legal ambiguity. This situation would prevail until sometime in the fall when this Court would decide on a petition for certiorari. Likewise, in any discussion of bilateral issues which might take place with Cuba in the next several weeks, the position of the United States would be weakened by Cuba's realization that an important source of Executive authority has been put in question. The Executive is thus deprived of a flexible and long-standing foreign policy instrument. This deprivation constitutes a serious impairment to the conduct of U.S. foreign policy, which Cuba can be expected to exploit rapidly.

11. Accordingly, in the opinion of those responsible for the execution of U.S. foreign policy, allowing the mandate to issue and the preliminary injunction to take effect would do significant and irreversible harm to U.S. foreign policy.

I state under penalty of perjury that the foregoing is correct.

/s/ James H. Michel
JAMES H. MICHEL
Acting Assistant Secretary of State
For Inter-American Affairs

Executed on June 23, 1983,
Falls Church, Va.

Notary at Large, State of Virginia
June 23, 1983

/s/ Brenda M. Anderson
My Commission Expires August 21, 1984

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

DONALD REGAN, ET AL., APPLICANTS

v.

RUTH WALD, ET AL.

DECLARATION OF JOHN M. WALKER, JR.

John M. Walker, Jr., under penalty of perjury, declares and says as follows:

1. I am the Assistant Secretary (Enforcement & Operations) of the United States Department of the Treasury. One of my responsibilities is to supervise Treasury's Office of Foreign Assets Control. Pursuant to a delegation of the President's powers under the Trading With the Enemy Act, this office implements the United States' economic embargoes of Cuba, Vietnam, Kampuchea and North Korea.

2. This declaration is based upon knowledge from the performance of my official duties. I am making it to explain how Treasury's enforcement of the embargoes will be irreparably harmed if a stay is not issued in the First Circuit case of *Wald* v. *Regan*, No. 82-1695.

3. Last year the Treasury Department modified a license in the Cuban Assets Control Regulations to prevent an outflow of dollars to Cuba. Without a stay, this dollar flow will resume, as pointed out in the declarations of the Assistant Secretary of State Thomas O. Enders and myself, which were filed in the First Circuit with the petition for rehearing. Once spent, those dollars cannot be retrieved from the Cubans. There have already been published news stories and tour advertisements indicating

that anyone can now travel to Cuba (TABS A and B). We have been informed by one Texas-based fishing tour operator that he is resuming his former business of organizing tour groups of Americans to travel to Cuba to fish and hunt, and we expect others to follow. However, my concern extends beyond tourist and business travel-related transactions with Cuba and, because the Trading With the Enemy Act is a criminal statute, my concern cannot be limited to impacts of the *Wald* decision solely in the First Circuit.

4. The Treasury Department depends heavily upon voluntary compliance with its published regulations by persons subject to United States jurisdiction. Such voluntary compliance is encouraged by the perception that a solid legal foundation underlies Treasury's embargo authorities. If a stay is not granted pending Supreme Court consideration of a petition for certiorari, the First Circuit's decision will raise serious doubts concerning several very important post-July 1, 1977 adjustments to the Cuban embargo. Respect for and compliance with the embargo controls are likely to decrease. Many more persons than we can detect will use the confusion created by a District Court injunction based on the *Wald* decision to violate embargo regulations promulgated since July 1, 1977, and claim a lack of the willful intent required for a successful prosecution under the Trading With the Enemy Act. So far, the Office of Foreign Assets Control has been able to hold off significant amounts of travel-related and other embargoed transactions with the Cubans by issuing a press release and answering press and public inquiries with emphasis on the fact that no injunction has been issued to bar enforcement. If a stay is denied, that line of embargo violation containment will be broken. Once broken, it will be difficult to re-establish, even if the Supreme Court upholds the Presidential authority at issue here.

5. In particular, the *Wald* opinion might be perceived as throwing into question the President's ability under

the Trading With the Enemy Act to prevent another Mariel type boatlift of illegal Cuban aliens to the United States. The provision of the Regulations that specifically addresses transactions relating to transportation of such aliens was promulgated in 1980. The undermining of the President's authority to stop an influx of illegal foreign aliens into the United States is a matter of grave national concern.

6. Less dramatic, but an essential part of the day-to-day operation of the embargo programs, is the public reaction that the *Wald* decision has provoked, as exemplified by the attached letter (TAB C) of May 27, 1983, from Donald E. Ward. That letter, which cites the *Wald* decision, questions whether the government can now require a specific, case-by-case licensing procedure for common carriers' telecommunications business with Cuba when a general license had applied on July 1, 1977. The public perception that the Treasury Department does not have authority to enforce the regulation concerning travel-related transactions, and other embargo regulations, can be extremely detrimental to our embargo programs.

7. The *Wald* opinion is being raised in disparate foreign assets control cases having nothing to do with individual travel. The issue of Treasury's grandfathered authorities under the Trading With the Enemy Act has been injected into an appeal of a criminal conviction concerning the Mariel boatlift of illegal Cuban aliens to the United States. *United States* v. *Frade and Doss*, No. 82-5179 (11th Cir.). The *Wald* opinion has been cited also in the case of *American Airways Charters* v. *Regan*, Civil Action No. 82-3243, now pending in the U.S. District Court for the District of Columbia. In that case, an officer of a designated Cuban national company, himself convicted of Trading With the Enemy Act violations, has now invoked the grandfather issue in his attempt to deal in property of the blocked company without the license that Treasury regulations require.

8. The Treasury Department has made many adjustments to the Cuban, Vietnamese, Kampuchean and North Korean embargoes since 1977 when the Trading With the Enemy Act authorities that were being exercised were grandfathered. So far as I have been able to determine, no member of Congress or even a Congressional staff person has at any time questioned any of those embargo adjustments as exceeding the grandfathered authority. These adjustments were all made openly, published in the *Federal Register* and subjected to public and Congressional scrutiny. Prior to the time the plaintiffs brought this action, none of these adjustments was challenged in any way by anyone on grandfathering grounds.

9. In sum, it is my firm belief that a stay is essential to avoid irreparable damage to the Treasury Department's enforcement of the embargo on Cuba (and the embargoes on Vietnam, Kampuchea and North Korea) while this case is being considered by the Supreme Court.

I declare, under penalty of perjury, that the foregoing is true to the best of my knowledge and belief.

/s/ John M. Walker, Jr.
JOHN M. WALKER, JR.
Assistant Secretary
(Enforcement & Operations)
United States Department of
the Treasury

Executed on June 23, 1983
Washington, D.C.

TAB A

WASHINGTON POST—May 17, 1983, Page A2

COURT LIFTS RESTRICTIONS ON U.S. TRAVEL TO CUBA

By Mary Thornton

Washington Post Staff Writer

A federal appeals court in Boston yesterday cleared the way for travel to Cuba by U.S. citizens, throwing out Reagan administration trade regulations that had the effect of preventing travel there by most Americans.

Bert Neuborne, legal director for the American Civil Liberties Union, a party to the suit, said last night that "anyone who wants to go to Cuba can go now."

Regulations issued in April, 1982, by the Treasury Department in effect had prohibited travel to Cuba by almost all Americans with the exception of professionals, journalists and people with relatives on the island. Tourist and business travel was virtually eliminated.

A lawsuit against the regulations was filed in U.S. District Court in Boston by Harvard biology professor Ruth Hubbard Wald, who had planend to take a group of students to Cuba last summer, and by other individuals and groups interested in traveling there.

The regulations were upheld by the District Court. Yesterday, the 1st U.S. Circuit Court of Appeals ordered the lower court to issue a preliminary injunction against the regulations.

Leonard B. Boudin, chief lawyer for Wald and the other plaintiffs, argued that the Treasury regulations "prohibited travel that had been permitted under the Carter administration" and interfered with a citizen's constitutional right to travel.

The appeals court opinion said that in drawing up the regulations Treasury relied on the 1917 Trading with the

Enemy Act, "the relevant part of which had been repealed by the time it [Treasury] promulgated this regulation."

The administration had argued that a clause of the 1977 International Economic Powers Act allowed Treasury to use the 1917 act to issue the regulations.

But the appeals court said that the 1917 law does not apply and that the procedures under the 1977 act were not properly followed "The regulations thus lack statutory authority," the court said.

The regulations prohibited most Americans from paying for "transportation-related" expenses "ordinarily incident to travel to and from Cuba" and for any other expenses "ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there."

Neuborne said that the 1917 trade act was intended to allow the United States "to deny hard currency to countries when the president determines our interests would be harmed by that trade."

Brad Marman, a spokesman for the Justice Department, said last night that there has been no decision whether to appeal the case to the Supreme Court.

TAB B

BASS TOURS, LTD.
713/358-2262
P.O. Box 5854
Kingwood, Texas 77325

CUBA IS OPEN AGAIN

JUSTICE PREVAILS. A three Judge U.S. Court of Appeals panel threw out the Treasury Department rules that banned travel to Cuba. The court ruled that the Treasury regulations violated the Constitutional RIGHT TO TRAVEL.

BASS TOURS LTD. will be offering fishing, hunting and dive package tours to LAKE HANABANILLA, LAKE REDONA, LAKE ZAZA, and LAKE CUYAGUATEJE. In November we plan to open a new area called LAKE LEONARO. THE LAST PARADISE KEYS FLOATING HOTEL will be the site for scuba diving, bonefish, and tarpon.

For the time being, tours will depart from CANCUN, MEXICO, the hottest tourist spot in the world today. Later charter flights will be added with a departure from Nassau in the Bahamas (this is a great depature point for those who enjoy gambling). And as soon as it is possible, we hope to add departures from MIAMI and FT. LAUDERDALE, FLORIDA. Unfortunately it takes a little while for the charter services to get all of their necessary paper work complete for both the U.S. and Cuban governments.

I just returned from Lake Hanabanilla where Steve Shoulders (resident Pro) and I landed a 13½, 12, 2-11½, 11, and a 10 pound bass. All were released. In addition to these unbelievable statistics, Arnoldo Francisco, a bellman at the Hanabanilla Hotel caught a 20 pound bass on April 28th. There is a remarkable story about this catch that will be printed in our next newsletter.

Dove and pigeon hunting start on July 25th, and duck season opens the first week in October. 50 new blinds have been constructed during our one year lay off.

The cost this year will be $995. for a 7 night/8 day package plan. For additional information on how you can be one of the first Americans back into CUBA, just pick up the phone and give me a call.

Bass wishes,

/s/ Dan Snow
DAN SNOW

AMER - MEX

HUNTING AND FISHING
Box 1482
Ft. Walton Beach
Florida 32549
(904) 243-4919

TOUR OPERATORS

CUBA NOW OPEN

Bass Fishing—Lake Hanabanilla, Cuba

This is the best lake in the world today for large bass. The first group to fish this lake caught 69 bass over 10 lbs. Dan Snow and Steve Shoulders fished this lake recently. Dan landed a 13½ pounder and Steve got one 15 pounds. Both had larger bass on that they didn't land. A Cuban landed a 20 pounder while they were there. If there is a world record bass anywhere, it's in this lake according to Dr. Roy Heidinger, one of the top bass research experts in the world. Trips run from Sunday to Sunday starting May 29th. Cost $995.00 includes transportation to Cuba and return, five and one half days fishing with modern bass boats and American motors and Cuban guides, hotel accommodations, food and transportation in Cuba. It does not include Cuban Visa or fishing license (approximately $20.00) or beer while fishing. Point of departure for Cuba has not been determined at this time.

Bass Fishing—Lake Guerrero, Mexico

Lots of one to five pound bass. Fifty to one hundred per day catches are common. Accommodations, food, boats, motors and guides are excellent. Cost approximately $160.00 per day. Includes fishing, accommodations, food, boats, guides and motor. Does not include tips at lodge or transportation to the lake.

Peacock Bass Fishing—Lake Gatun, Panama

This is a super trip for husbands and non fishing wives. Fishing is super on one to five pound. One hundred bass per day is common. Accommodations are excellent. You stay at a first class hotel in downtown Panama City. Sight seeing and shopping is excellent for non fishermen. Las Vegas type gambling is legal and very popular. Cost $675.00. Includes three days fishing, four nights at first class hotel, American boats and motors and Panamanian guides, lunch while fishing. Transportation in Panama. Does not include tips, transportation to Panama and return, meals other than lunch while fishing.

Peacock Bass and Payara Fishing—Orinoco River—Colombia, S.A.

This is the best trip we know about for huge fish. Twelve of us made this trip last June. We caught Peacock bass up to 21 pounds and Payara up to 24 lbs. The world record has been broken here several times in the past two years. Everyone in our group caught a fish of fifteen pounds or better. Peacocks in the ten to twenty pounds are common and also Payara in the fifteen to twenty five pounds. Trip only runs from early January to late March. We have the first two trips booked in early January 1984. This is the best fresh water fishing you will ever see. It takes lots of patience getting there and returning. You spend the first and last nights of the trip in Bogata. The Orinoco is approximately 3½ hours from Bogata. Cost $1,495.00. Includes six days fishing with native boat, American motors and Indian guides, accommodations are on a house boat. Facilities are crude but adequate. Food is American style and fair to good. All drinking water is boiled. Accommodations are very clean. Cost does not include transportation to the Orinoco, hotel at Bogata, beer and coke or tips. Trips run from Saturday to Saturday at the Orinoco. Many times you are fishing virgin waters.

TAB C

Law Offices
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Washington, D.C. 20006

May 27, 1983

Mr. Dennis M. O'Connell
Director, Office of Foreign Assets Control
Department of the Treasury
1331 G Street N.W.
Washington, D.C. 20220

Re: Wold Communications, Inc.;
Provision of Communications
Service to Cuba Incident to
1984 Olympic Games

Dear Mr. O'Connell:

By our letter of April 11, 1983, we set forth the arrangements between our client, Wold Communications, Inc., and La Empressa de Telecommunicaciones Internacionales de Cuba (EMTELCUBA), looking toward Wold's provision of communications services to EMTELCUBA during the 1984 Olympic Games. Based on our understanding of 31 CFR § 515.542, we stated that "it appears as though we need a specific license in order to provide the service and receive the U.S. dollar remuneration from EMTELCUBA," and requested such a specific license. To date, no action has been taken on that request, despite our April 26 letter (providing additional information requested by your deputy, Ms. Muench), requesting action promptly.

In the meantime, on May 16, 1983, the U.S. Court of Appeals for the First Circuit issued its opinion in *Wald* v. *Regan* (Case No. 82-1695), directing the U.S. District Court to enjoin the Department of the Treasury from

enforcing 31 CFR § 515.560, which purported to restrict transactions involving travel to Cuba. While the Department has unofficially taken the position that the Court's opinion "has no bearing on non-travel aspects of the comprehensive trade and financial embargo against Cuba, which has been in effect since 1963" (Treasury News release of May 19, 1983), our reading of that opinion, together with the history of § 515.542, leads us to the view that the 1980 amendment to that regulation—by which, *inter alia*, communications from the United States to Cuba would no longer be generally licensed but for the first time would require a "specific" license—is invalid for the identical reasons found by the Court to vitiate § 515.560.

As the *Wald* opinion notes (Slip Opinion, p. 5), the 1977 repeal of the 1917 Trading With the Enemy Act contained a "savings clause" stating:

> "[T]he authorities conferred upon the President by [the old version of] section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country . . . (91 Stat. at 1625).

As of the relevant date of July 1, 1977, the Treasury regulations provided for a "broad, general license allowing all persons traveling to Cuba to pay for their transportation and living expenses" (*Ibid*). The Court found that the subsequent amendment of those regulations to bar transactions in connection with travel to Cuba except upon the issuance of a specific license were not "saved" by the savings clause, and, since not adopted as otherwise required by 1977 International Emergency Economic Powers Act (50 U.S.C. §§ 1701-06), were invalid.

Precisely the same situation obtains as to § 515.542:

(1) As of July 1, 1977, that section conferred a general license for "all transactions of common car-

riers incident to the receipt or transmission of mail or telecommunications between the United States and Cuba."

(2) The August 24, 1980 amendment of § 515.542 purported to limit the general license to mail, and to the "use of satellite channels for the transmission of television news and news programs originating in Cuba by United States news organizations," and to otherwise require specific licenses for other communications services between the United States and Cuba. That amendment—like the 1982 amendments to § 515.560—did not follow the consultative procedures mandated by the IEEPA: As with the 1982 travel restrictions, the Department relied upon Section 5 of the Trading With the Enemy Act, although that had been repealed three years earlier.

In view of the foregoing, it is our current position that no specific license is required by our client to enable its furnishing to EMTELCUBA the communications services outlined in our letters of April 11 and 26, 1983, in connection with the 1984 Summer Olympics. We would welcome an early expression of the Department's views on this issue, however. Because of the extensive coordination which we anticipate will be required in order that our client may handle in a professional manner the large volume of communications services incident to the 1984 Olympics which have been requested of it, it is essential that it obtain an early resolution of the status of its arrangement with EMTELCUBA.

Please do not hesitate to contact me in the event of any questions concerning this matter.

Very truly yours,

/s/ Donald E. Ward
DONALD E. WARD

cc: Ms. Marilyn Muench
Mr. Timothy C. Brown

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SUPREME COURT OF THE UNITED STATES

No. 83-436

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 28, 1983

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 429469 317

Office - Supreme Court, U.S.
FILED
OCT 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, Secretary of the Treasury, *et al.*,
Petitioners,

v.

RUTH WALD, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether the Treasury regulations of April, 1982 restricting travel to Cuba, 31 C.F.R. 515.560, were invalid because the petitioners failed to comply with the procedures of the 1977 International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp.V) §§ 1701-1706.

2. Whether the regulations were invalid despite a savings clause, providing that the "authorities . . . being exercised" with respect to a country on July 1, 1977 under § 5(b) of the Trading with the Enemy Act (TWEA) may continue to be exercised with respect to that country, Pub.L. No. 95-223, §101(b), 91 Stat. 1625, 50 U.S.C. App.5 note (1977), in view of the fact that on July

1, 1977 the executive branch was not exercising the power to prohibit the travel of American citizens to Cuba.

3. Whether the 1978 Amendment to the Passport Act, 22 U.S.C. § 211(a), prohibits the executive branch from imposing area restrictions upon the travel of American citizens in the absence of war, hostilities or danger to their safety.

4. Whether the Trading with the Enemy Act was ever intended to prohibit, upon pain of criminal sanctions, the peacetime travel of American citizens.

5. Whether the Treasury's 1982 prohibition of travel to Cuba based upon the 1950 Korean War declaration of emergency violated the constitutional rights of American citizens under the

First and Fifth Amendments to travel to Cuba for the purpose of meeting with Cuban citizens and of observing conditions in that country.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 83-436

DONALD REGAN, Secretary of the Treasury, et al.,

Petitioners,

v.

RUTH WALD, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations, in addition to those set forth by petitioners, are the International Emergency Economic Powers Act, 50 U.S.C.

(Supp. V) §§ 1701-1706 (IEEPA); and the Passport Act of 1926, 22 U.S.C. § 211(a), as amended by the 1978 Foreign Relations Authorization Act § 124; Pub.L. 95-426, §124, 92 Stat. 971, both reproduced in Appendix A infra, 1a to 7a.

STATEMENT

1. On March 9, 1977, President Carter announced the removal of all restrictions on the travel of American citizens to Cuba.[1/] This announcement was immediately implemented by the State Department[2/] and followed by the

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1/ President's News Conference of March 9, 1977, 13 Weekly Comp. of Pres. Doc. 328-29 (Mar. 14, 1977).

2/ By regulation, area restrictions on travel to designated countries were issued periodically by the Secretary of State in the Federal Register, 22 CFR Part 51 (1974-77). The last such notice to appear for Cuba appears at 41 Fed.
(footnote continued)

Treasury Department.[3] The Executive took these actions in accordance with President Carter's campaign pledge to comply with the Final Act of the Conference on Security and Cooperation in Europe (1975)[4] (hereinafter "Helsinki")

(footnote continued from previous page) Reg. 41105 (Sept. 21, 1976). On March 18, 1977, the State Department's passport restrictions expired. See C.A. Appendix of Legislative History, Item A, at 15, n.7. The Treasury Department's regulations were removed as a matter of course on March 21, 1977, since those regulations were dependent on the State Department's prohibition. Thus, President Carter's instruction to the Secretary of State to "remove any travel restrictions on American citizens who want to go to . . . Cuba," President's News Conference of March 9, 1977, 13 Weekly Comp. of Pres. Doc. 328-29 (Mar. 14, 1977), led to the removal of all impediments to such travel.

[3] 42 Fed. Reg. 16621 (March 29, 1977) (declaring that transactions incident to travel are not barred).

[4] President's News Conference of March 9, 1977, 13 Weekly Comp. of Pres. Doc. 328-329 (Mar. 14, 1977).

which called for greater understanding among nations through freedom of international movement and communication.5/

Reciting the same reasons, Congress in 1978 amended the Passport Act of 1926 to enact into law President Carter's determination to remove all travel restrictions. Pub.L. 95-426, § 124, 92 Stat. 971, 22 U.S.C. § 211(a) (1978) (hereinafter "Section 211(a)"). This 1978 amendment limited the government's power to restrict travel by passport control, the customary method used for that purpose, and authorized area restrictions in only three instances: war, actual hostilities in the area, and physical

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5/ See Dep't State Bull., Sept. 1, 1975, at 323.

danger to American citizens.[6] The government concedes that none of these circumstances is applicable here. Although the Executive Branch had already changed the prior restrictive policy to conform to Helsinki principles, Congress in 1978 amended 22 U.S.C. § 211(a) because "the freedom-of-travel principle is sufficiently important that it should be a matter of law and not dependent upon a particular Administration's policy." S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978).

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[6] S.Rep. No. 95-842, 95th Cong., 2d Sess. 14-15 (1978). The Senate Report notes that the amendment restricts the President's authority to limit use of passports for the purpose of achieving greater compliance with the Helsinki Final Act, and to encourage other signatory countries to comply. Id.

In direct contravention of this congressional mandate, the Reagan administration, in April, 1982, promulgated new Treasury regulations restricting travel to Cuba. 47 Fed. Reg. 17030, now codified at 31 C.F.R. 515.560. The Executive attempted to avoid the mandate of Section 211(a) by relying on the Treasury Department's authority to regulate commerce and trade with foreign countries, pursuant to a statute originally enacted in 1917, the Trading with the Enemy Act (hereinafter "TWEA"), rather than on the State Department's traditional authority over passports. These new regulations, which prohibit "travel transactions" on pain of substantial criminal penalties[7/],

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7/ 50 U.S.C. App. § 16 makes a willful violation of any provision of the TWEA (footnote continued)

represented the first express attempt to use the TWEA to restrict the travel of Americans and only the second occasion in which Treasury, rather than State, was the instrument.[8/] The government

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(footnote continued from previous page) punishable by a $50,000 fine or imprisonment for ten years, or both.

The only method of travel control which the Executive had ever before attempted to enforce through criminal sanctions was the regulation of passports. In United States v. Laub, 385 U.S. 475, 485 (1967), this Court held that the statute relied on by the government to prosecute travel to Cuba did not in fact make such travel a crime, and noted that "the State Department had consistently taken the position that there was no statute which imposed or authorized" criminal sanctions upon violation of area restrictions (emphasis added).

[8/] In 1980, 63 years after TWEA's enactment, under the hydraulic pressure of the Iranian crisis, the government invoked IEEPA in an attempt to ban travel to Iran. Exec. Order No. 12211, 45 Fed. Reg. 26,685 (Apr. 21, 1980). Even then, there was no attempt to enforce the regulation despite the widely publicized (footnote continued)

originally construed its regulation to bar even hosted travel involving no payment to Cuba although it subsequently

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(footnote continued from previous page) travel to Iran undertaken by former Attorney General Ramsey Clark and numerous other individuals.

The government's assertion here that "[t]ravel-related property transactions ... have been covered by the provisions of the Cuban Assets Control Regulations since 1963" (Pet. 7) is belied not least by its position during and after United States v. Laub, supra. As this Court's unanimous opinion in Laub noted, more than 600 individuals were known to have violated area travel restrictions by 1967 (and, by the government's hypothesis, the Cuban Assets Control Regulations as well). Nevertheless, the prosecutions in Laub and its companion case were the only attempts to enforce the area restrictions on Cuba; there was no assertion of any alternative source of power under the TWEA to enforce the ban on travel to Cuba, and the State Department conceded that there was "no statute which imposed or authorized" criminal sanctions for travelling to Cuba in violation of the administration's strenuous strictures. Id. at 485 (emphasis added). See also Association of the Bar of the City of New York Report, Freedom to Travel, at 72 (1958) (concluding that TWEA not intended

(footnote continued)

changed that position.[9] The Executive purported to issue the 1982 regulations under the TWEA; however, that statute, as the Court of Appeals determined, could not have given the government the authority to promulgate the travel restrictions at issue here. In 1977, after long and careful study and in

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(footnote continued from previous page) to be used as a device for regulation of travel), cited in United States v. Laub, 385 U.S. 475, 486, n.20 (1967).

[9] The government initially advised persons inquiring that 31 C.F.R. 515.560 bars travel even if it is wholly gratuitous, and results in no financial transfers or advantage to Cuba. See C.A.J.A. 20,21 (Mayerson Affidavit); see also C.A.J.A. 28 (Treasury Department Statement). Only later, when respondents' counsel indicated to the district court the implication of this broad claim of "economic" power did the government announce in open court a sudden change of position, under which it would not prosecute such hosted travel, while not disclaiming authority to do so. This position was later confirmed by regulation, 47 Fed.Reg. 32060 (July 23, 1982), codified at 31 C.F.R. 515.560(j).

response to widespread congressional judgment that the executive had substantially abused the emergency power originally granted it in 1917, Congress largely limited TWEA to wartime situations by passing the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp. V) §§ 1701, et seq. (App. A, infra, p.2a). That Act, as the government correctly notes, "established a new statutory framework for the President's exercise of economic powers during periods of national emergency" (Pet. 4). IEEPA was to govern all future peacetime uses of emergency power; the powers formerly exercised by the President were preserved during peacetime, in petitioners' words, only "to continue an existing embargo" (Pet. 5), i.e., one existing on July 1,

1977.[10]/ It is undisputed that there was no prohibition of or "existing embargo" on travel to Cuba on July 1, 1977, any such restrictions having been publicly removed four months earlier by President Carter.

2. The respondents are American citizens who seek to travel to Cuba and not-for-profit organizations engaged in educational research on Cuba. They include a lawyer, religious leaders and university professors, whose purpose was neither business nor holidays, but rather to learn about Cuba, its people and culture, in some cases to renew acquaintances made during prior visits, and to establish political contact with the

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[10]/ See 50 U.S.C. App. 5 note.

Cuban people.[11] They initiated this suit because the Treasury on April 20, 1982 made such travel impossible by the promulgation of 31 C.F.R. 515.560.

Without accepting his reasoning, the district court followed the recommendation of a magistrate to deny plaintiffs' application for a preliminary injunction (Pet. 22a-23a). The district court observed that plaintiffs had raised "fundamental constitutional issues that might well be proven at trial to be meritorious" (Pet. 22a-23a), although it determined that they had not shown the "substantial likelihood of success on the merits" necessary for a preliminary injunction.

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[11] C.A.J.A. 5-8 (Complaint).

A unanimous Court of Appeals reversed and ordered the district court to issue the preliminary injunction. The appellate court subsequently denied the government's petition for rehearing (Supplemental Opinion, Pet. 15a-19a), and its suggestion for rehearing en banc without dissent.

In two opinions written by Judge Breyer, the Court of Appeals held that the Cuban travel regulations lacked statutory authority because the Treasury had failed to "follow the 'consultative' procedures mandated" by IEEPA -- "procedures aimed at focusing the attention of Congress as well as the President on the need for the restrictions of the sort at issue here" (Pet. 2a). It further held that the savings clause allowing continuation of existing

restrictions did not authorize the regulations because it preserved only those prohibitions in existence on July 1, 1977. Accordingly, the Court of Appeals held that the regulations were invalid.

The unanimous opinions of the Court of Appeals are a model of legislative analysis based on a careful review of the statutory language, its extensive legislative history and an obedience to this Court's rules of statutory construction.12/

12/ The only other court of appeals which has considered the issue unanimously agreed that the position the government advances here was not supported by the legislative history and purpose of TWEA's grandfather clause and by its function within the broader statutory scheme. United States v. Frade, 709 F.2d 1387, 1398-99 (11th Cir. 1983).

The Court of Appeals found that on July 1, 1977 "the government was not restricting travel to Cuba" (Pet. 4a; emphasis in original), since on March 29, 1977 the government had removed any existing restrictions on Cuban travel. Because no travel controls were being "exercised" on that critical date, the court determined that the grandfather or savings clause did not permit their reinstatement without the procedural safeguards of IEEPA.

The court rejected the government's contention that the words "authorities being exercised" had such broad meaning that if any TWEA authority was being exercised the savings clause gave the government "the power to exercise every TWEA authority or at least every authority of the same broad type" (Pet.

5a). Noting that "this is not what the clause says" (Pet. 5a; emphasis in original), the Court of Appeals also looked to the legislative history and related administrative practices, and found no support there for the government's position.

The court also determined that "the legislative history makes clear that Congress intended the savings clause to be narrowly interpreted" (Pet. 7a). As the court pointed out, earlier drafts of the bill had included language that "might have allowed a broader reading of the 'savings clause,' thereby preserving TWEA powers that were not then exercised" (Pet. 9a).[13/] Congressman Bingham, the

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13/ The initial draft of the savings clause contained the following language: "any other authority conferred upon the President by [Section 5(b)] may be (footnote continued)

sponsor of the legislation, rejected that language in favor of the narrower language which ultimately became the grandfather clause in TWEA.

The court supported its conclusion by far more than "ordinary principles of statutory construction" (Pet. 11a). In addition to a thorough analysis of the legislative history of IEEPA and the TWEA amendments, the Court of Appeals relied on this Court's recognition in Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964), that travel is a "'constitutional right closely related to' those activities that the Bill of Rights protects

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(footnote continued from previous page) exercised to deal with the same set of circumstances. . . ." Amendments to the Trading With The Enemy Act: Subcommittee Working Draft of June 8, 1977, 95th Cong., 1st Sess. § 101(b) (emphasis added) (attached as Appendix B). See Pet. 9a.

from infringement by Congress" (Pet. 11a). Thus, the Court of Appeals was bound to "'construe narrowly all delegated powers that curtail or dilute' the right to travel." Kent v. Dulles, 357 U.S. 116, 129 (1958) (Pet. 12a).

Finally, the court concluded that this case fell under the third of Justice Jackson's famous categories in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) -- the area in which Congress had taken measures inconsistent with the President's claim to power. The enactments in 1977 of IEEPA and in 1978 of the amendment to 22 U.S.C. § 211(a) are only two examples of statutes limiting presidential powers on which the Court of Appeals relied. See also War Powers Resolution, Pub.L. 93-148, 87 Stat. 555 (1973), codified as amended at

50 U.S.C. §§ 1541-1548; National Emergencies Act, Pub.L. No. 94-412, 90 Stat. 1255 (1976), codified as amended at 50 U.S.C. §§ 1601-1651 (Pet. 13a).

Reasons For Denying The Petition

First, the decision of the court below is indisputably correct and is now supported by the unanimous decision of the Court of Appeals for the Eleventh Circuit in United States v. Frade, 709 F.2d 1387 (11th Cir. 1983), petition for rehearing denied (September 23, 1983), which adopted the reasoning of the First Circuit in the instant case. (See Point I, infra, p.22).

Second, petitioners are not challenging the court below so much as they are the mandate of Congress in IEEPA. All of their arguments are directed at IEEPA as a whole, not merely

to its application to post-1977 regulations concerning Cuba. Unless this Court is prepared to pronounce on IEEPA's conformance to separation of powers principles - a subject not raised below - review of the order below would needlessly and prematurely inject the Court into a dispute between Congress and the Executive. It is significant that petitioners have failed to cite, much less to distinguish, this Court's most celebrated decision requiring the Executive to comply with the law enacted by Congress even when foreign affairs are concerned. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (See Point II, infra, p.34).

Third, petitioners pose a series of imaginary dangers that would follow from compliance with IEEPA and argue that the

decision below must be reversed to afford the executive the needed "flexibility" in implementing foreign policy. These dangers are exaggerated and speculative, however, and more importantly, are avoided by the use of IEEPA, in which Congress gave the President the greatest flexibility it believed possible, consistent with a constitutional structure of government which entrusted the law-making power to the Legislature, not the Executive. (See Point III, infra, p.38).

The granting of a petition for certiorari is, of course, a discretionary act of this Court. Such discretion should not be exercised here where two courts have reached the same conclusion upon the basis of accepted rules of construction and this Court would be re-

quired to address additional, sensitive statutory and constitutional problems. (See Point IV, infra, p.42)

I

The lower court's compelling construction of the statutory language is the only construction which is logical and consistent with the legislative history and other indications of congressional intent.

Statutory Language.

The court relied first upon the language of the statute, which permits the executive to avoid IEEPA's remedial measures by continuing only those prohibitions and restrictions "being exercised" on July 1, 1977. We agree with petitioners' formulation that the savings clause was intended to allow the

President "to continue under the old statutory scheme the embargoes that were in effect at the time the new legislation was being considered" (Pet. 5). The flaw in petitioners' argument is that travel, unlike trade, was not embargoed on July 1, 1977.

In contrast to the Court of Appeals' precise construction, the government offers several contradictory interpretations of the savings clause:

(a) First, the government contends that "the authorities 'being exercised' with respect to Cuba on July 1, 1977, plainly encompassed the authority to impose restrictions on travel-related transactions" (Pet. 15-16). The government misses the point of TWEA's grandfather clause. The test under the savings clause is whether the authority

was "being exercised" on that date, not whether it "encompasses" another authority which is not being exercised.

(b) Second, the government argues that although 31 C.F.R. § 515.560 did not restrict travel on July 1, 1977, it was an exception to the general prohibition of all transactions with Cuba contained in 31 C.F.R. 515.201. Rejecting the government's interpretation, the Court of Appeals correctly determined that this argument was invalid because the court "assumed that substance (i.e., was travel in fact being regulated?) rather than form, controlled." (Pet. 16a, emphasis in original). If petitioners' argument were correct, IEEPA would be permanently inapplicable to any country as to which any § 5(b) emergency powers were being exercised at the time of its enactment.

This interpretation, which encompasses far more countries than Cuba, is plainly contradicted by both the language and legislative history of IEEPA and the TWEA savings clause.

(c) Third, the government contends that the 1977 promulgation of 31 C.F.R. 515.560, authorizing travel to Cuba, was itself an exercise of embargo power and was sufficient to trigger application of the grandfather clause (Pet. 16, 17). This construction is contrary to the language and explicit purpose of the savings clause -- not to preserve existing sources of power but to continue existing prohibitions.

(d) The government argued to the court below that the mere existence of a national emergency proclamation authorizes the President to impose any and all

5(b) restrictions (Pet. 16a). It is unclear whether the government has abandoned this interpretation, which is plainly without merit and at odds with the purpose of IEEPA to subject executive exercises of emergency powers to congressional control.

Legislative History.

The Court of Appeals' full discussion of legislative history needs no repetition here (Pet. 7a-10a). Petitioners' selected references (Pet. 20-25) are at best ambiguous, as the court below noted in its supplementary opinion (Pet. 17a), and certainly not comparable to the extensive references relied upon by the court (Pet. 7a-10a). Petitioners' use of the terms "embargoes" and "existing embargoes" (Pet. 23-24) omits the critical term of reference: whether

travel was embargoed on July 1, 1977. The government's approach renders the term "existing uses" mere surplusage. If Congress intended to grandfather countries or existing states of emergency it would not have rejected the language which clearly and simply accomplished that purpose. Supra, p.16 & n.13, infra, App. B., p.6a. The Eleventh Circuit agreed that this legislative history supports and compels the conclusion of the court below. United States v. Frade, 709 F.2d at 1397-1402.

None of the ambiguous statements the government picks out of the legislative history supports its premise that travel actually was controlled or embargoed on July 1, 1977 (Pet. 17 n.29; 23). When Congressman Bingham, the primary sponsor of the legislation, referred to

"embargoes," id, he was not referring to an embargo upon travel, but to "trade embargoes and assets control programs currently applied by the United States" (Pet. 23 n.36)(emphasis supplied).

Legislative Purpose.

Petitioners are strangely silent on the central issue in the case: the purpose behind enactment of IEEPA and the reason Congress added the savings clause. The opinions of the court below and of the Eleventh Circuit answer both questions: (1) IEEPA was passed because Congress was dissatisfied with the executive branch's broad use of emergency powers and sought to establish new procedures for peacetime emergencies; (2) the savings clause was added to avoid the need for a new presidential proclamation as a condition to continuing existing

prohibitions (Pet. 7a-10a). As the court below said: "the reason for the 'savings clause' -- the need to avoid this type of public act in order to continue ongoing restrictions -- simply bears no relation to this case" (Pet. 11a, emphasis in original).14/

Administrative Practice.

Petitioners' claim that the court's construction of the savings clause "disaggregates" the authorities being exercised on July 1, 1977 (Pet. 18), disregards not a page but a book of

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14/ Petitioners' assertion that the Foreign Assets Control program of July 1, 1977 has "continued to evolve since that date" (Pet. 20), even if true, would not resolve the question of Congress' purpose in enacting IEEPA and the grandfather clause. Petitioners' statement is misleading, however, since petitioners' citations disclose no substantive change in the regulations (See Pet. 20-21 n.33). In this respect the new travel restrictions challenged here are unique.

history. As the court below demonstrated, "administrative practice suggests that the government, historically speaking, has always considered travel restrictions different from other, more typical, TWEA rules and regulations" (Pet. 5a). It noted that "documents submitted to this Court indicate that Treasury still treats travel restrictions as different from other restrictions" (Pet. 6a; see also Pet. 16a). Of course, not only did the Executive Branch itself "disaggregate" when, in March 1977 it authorized travel to Cuba and in 1982 sought to impose restrictions, but, in addition, our country has persistently argued that the currency controls through which Soviet bloc countries restrict

travel violate the Helsinki agreement and are different in kind from ordinary trade and commercial restrictions.15/

Principles of Statutory Construction.

The decision below was made in accordance with four principles of statutory construction, repeatedly relied on by this Court: (1) remedial statutes, such as IEEPA, are to be broadly

15/ See, e.g., Commission on Security and Cooperation in Europe, Implementation of the Final Act of the Conference on Security and Cooperation in Europe: Findings and Recommendations Two Years After Helsinki, Report Transmitted to the House Committee on International Relations, 95th Cong., 1st Sess. 91 (Sept. 23, 1977)("obstacles to travel by Soviet citizens in the West include ... the small [90 rubles] currency allowance"). Id. at 98 (similar Czechoslovakian restrictions); id. at 104 (Hungary); id. at 109 (Poland)("one considerable restriction is that of foreign exchange").

construed;[16] (2) savings or grandfather clauses, in contrast, require narrow construction;[17] (3) criminal statutes require narrow construction;[18] (4) as do other statutes affecting basic liberties.[19]

16/ E.g., Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1959); Spokane & Inland Empire R.R. Co. v. United States, 241 U.S. 344, 350 (1915).

17/ Id.

18/ E.g., United States v. Laub, 385 U.S. 475, 480 (1967); United States v. Boston & Maine R.R., 380 U.S. 157, 160 (1965); Commissioner v. Acker, 361 U.S. 87, 91 (1959); Smith v. United States, 360 U.S. 1, 9 (1959); F.C.C. v. American Broadcasting Co., 347 U.S. 284, 296 (1954).

19/ E.g., N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 504-507 (1979); Kent v. Dulles, 357 U.S. 116, 129 (1958).

Related Statutes.

Finally, the decision below is consistent with several other congressional statutes: the 1978 Amendment to the Passport Act of 1926; the War Powers Resolution, Pub.L. 93-148, 87 Stat. 555 (1973); and the National Emergencies Act, Pub.L. No. 94-412, 90 Stat. 1255 (1976). The court was correct in looking at these contemporaneously enacted statutes "for the light they cast on the historical context of the statute at issue" (Pet. 12a), citing Dames & Moore v. Regan, 453 U.S. 654, 678 (1981), since they too were intended to restrict the President's power to involve the United States in foreign adventures and to protect the rights of United States citizens.

II

Petitioners express concern over the alleged impact of the decision below upon the President's flexibility in carrying out foreign policy. The criticism is inaccurate and misplaced: inaccurate because IEEPA, regrettably in our view, gives the Executive very substantial flexibility; misplaced, because it was for Congress to determine the degree of flexibility to be given. The court below properly disposed of the government's complaint by relying on Justice Jackson's statement in Youngstown Sheet & Tube Co. v. Sawyer, that in cases like this "courts can sustain exclusive presidential control . . . only by

disabling the Congress from acting upon the subject." 343 U.S. at 636-37 (Pet. 12a).20/

Petitioners defend the regulation on the ground that educational travel will some day make "hard currency" available to Cuba. This "hard currency" argument is pure fiction. The very regulation challenged here authorizes the travel of Cuban-Americans visiting relatives in Cuba, which produces far more hard currency to Cuba than the travel of other American citizens, such as respond-

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20/ Petitioners' quotation from MacKenzie v. Hare, 239 U.S. 299, 311 (1915) (Pet. 21) is not only inapposite but ironic. When this Court held that it "should hesitate long before limiting or embarrassing such powers," it was upholding a denationalization act of Congress. In the present case it is respondents who rely upon a congressional enactment which the Executive seeks to circumvent.

ents;[21] and the amount of trade permitted to Latin-American affiliates of American corporations gives even greater economic benefit to Cuba.[22] If "hard currency" were actually the reason to reinstitute travel controls, the President has available to him the elimination of these and other economic advantages to Cuba.

Nor is petitioners' fear that the use of IEEPA procedures "could have grave foreign policy implications" (Pet. 14) and "could needlessly heighten tensions and adversely affect United States

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[21] The government has estimated that 60 percent of the Americans travelling to Cuba are Cuban-Americans to whom the restrictions do not apply. See C.A.J.A. 19 (Mayerson Affidavit). See also C.A.J.A. 28 (Treasury Department Statement).

[22] See C.A.J.A. 22 (Mayerson Affidavit).

foreign policy interests" (Pet. 15), even if relevant, credible. Notwithstanding the Court's understandable reluctance to second guess the Executive on such questions, surely it need not disregard the far more serious tensions caused by the naval "maneuvers" around Nicaragua, the publicly-admitted United States military and CIA support for the overthrow of the Government of Nicaragua and the escalation of United States language with respect to Cuba and Nicaragua.23/ An IEEPA declaration is certainly de minimis

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23/ See, e.g., Sandinistas Under Siege, N.Y. Times, Oct. 17, 1983, § A at 1, Col. 3; U.S. Officials Say C.I.A. Helped Nicaraguan Rebels Plan Attacks, N.Y. Times, Oct. 16, 1983, § A at 1, Col. 4; America's Secret Warriors: The CIA Reborn, Newsweek, Oct. 10, 1983, at 38.

compared to this public provocation.[24]

III

The granting of the petition for certiorari would require the Court to decide several statutory and constitutional questions raised by the respondents in both courts below.

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[24] Of course, assuming arguendo that IEEPA (and TWEA) were intended to reach travel, an IEEPA declaration is not the only alternative available to the Executive. If the Executive wanted to proscribe travel to Cuba without making such a declaration, it could seek legislation so authorizing. See I.N.S. v. Chadha, 51 U.S.L.W. 4907 (June 21, 1983).

It is significant that the argument which the Executive is making to influence the Court in this case -- that the mere invocation of IEEPA might have disastrous implications for our foreign policy -- is precisely the argument with which it attempted to frighten Congress recently with respect to Lebanon and the invocation of the War Powers Resolution.

The first issue the Court would have to reach is whether the 1978 amendment to the Passport Act prevents the executive as a whole from imposing area restrictions. The 1978 Amendment refers to passports because passport restrictions were the manner in which travel or area restrictions were traditionally imposed. See Haig v. Agee, 453 U.S. 280 (1981); United States v. Laub, 385 U.S. 475 (1967); Zemel v. Rusk, 381 U.S. 1 (1965). Its legislative history, however, makes clear that Congress intended to address and limit the Executive's power to impose area controls in any form.[25] Congress

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[25] The amendment to § 211(a) originated in the Senate. See S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978). There was no comparable provision in the House, and the amendment was added to the House bill in conference. See H.R. Conf. Rep. No. 95-1535, 95th Cong., 2d Sess. 45, reprinted in 1978 U.S. Code Cong. and Ad. (footnote continued)

was concerned not with the State Department and its passport function, but rather with "the freedom of travel principle." S. Rep. No. 95-842, supra. The government's claim that the regulation challenged here does not implicate the concerns of section 211(a) renders that statute a meaningless gesture. As this Court has said: "[S]ophisticated as well as simple-minded" attempts to evade limitations on governmental power are equally unlawful. Lane v. Wilson, 307 U.S. 268, 275 (1939). See also Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

A second issue requiring decision (should petitioners prevail on the savings clause point) is whether TWEA

(footnote continued from previous page) News 2478, 2486. It was not debated on the floor of either chamber.

ever authorized restrictions on the constitutional right to travel. In the 66 years since its passage, TWEA has never been enforced against the thousands of persons who have openly travelled to nations subject to general embargoes. When Congress intended to limit travel or even to deter it, it enacted legislation directed explicitly to this issue. See, e.g., 40 Stat. 559, Chapter 81 (1918 statute described by this Court as "the first travel control statute," Haig v. Agee, 453 U.S. 280, 296, (1981)). See also H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3 (1918)(concluding that TWEA leaves American citizens free to come and go); Association of the Bar of the City of New York, Freedom to Travel at 70. (1958) (concluding that there is no statute which provides a penalty for

violations of area restrictions), cited in United States v. Laub, 385 U.S. at 486, n.20. Even to the extent that the Treasury has claimed that the general Cuban embargo restricts travel transactions--an issue which was not resolved below and on which the parties are in serious disagreement --it is clear, as the court below found, that the Treasury merely followed and attempted to implement the primary State Department policy upheld in Zemel v. Rusk, supra, and took no independent role.

IV

Finally, this Court would be required to address the constitutionality of the executive branch's attempt to restrict the peacetime travel of American citi-

zens. The right to travel was reaffirmed by this Court in Kent v. Dulles, 357 U.S. 116 (1958); United States v. Laub, 385 U.S. 475 (1967); and Aptheker v. Secretary of State, 378 U.S. 500 (1964). It was recognized in Haig v. Agee, supra, where the Court upheld the revocation of a passport based upon Agee's refusal to challenge the government's charge that his travel endangered security and foreign relations, and where the government claimed that Agee's travel might result in the assassination of CIA operatives abroad, a far cry from the amorphous economic interests here balanced against the liberty of movement. In Zemel v. Rusk, the Court was careful to indicate the limitations of its holding, namely, that the Secretary of State could not be compelled to validate

a passport for travel to Cuba. The Court did not decide whether the government could lawfully prohibit such travel through criminal sanctions, and indeed, later decided that it could not in United States v. Laub, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 21, 1983.

APPENDIX A

STATUTES INVOLVED

The 1978 Foreign Relations Authorization Act §124; Pub. L.95-426, §124, 92 Stat. 971, now codified at 22 U.S.C. §211(a), provides:

Limitation on Geographical Travel Restrictions in United States Passports

> **Sec. 124.** For the purpose of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for the purpose of encouraging other countries which are signatories to the Final Act to comply with those provisions, the first section of the Act entitled "An Act to regulate the issue and validity of passports and for other purposes", approved July 3, 1926 (22 U.S.C. 211a), is amended by adding at the end thereof the following: "Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the pub-

lic health or the physical safety of United States travellers.

The International Emergency Economic Powers Act, 50 U.S.C. (Supp. V) §§1701-1706, provides in relevant part:

TITLE II--INTERNATIONAL EMERGENCY ECONOMIC POWERS

. . .

Situations In Which Authorities May Be Exercised

Sec. 202. (a) Any authority granted to the President by section 203 may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 203 may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose. Any exercise of such authorities to deal with any

new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

Grant of Authorities

Sec. 203. (a)(1) At the times and to the extent specified in section 202, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise--

(A) investigate, regulate, or prohibit--

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof.

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions

involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

* * *

Consultation and Reports

Sec. 204. (a) The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this title and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Whenever the President exercises any of the authorities granted by this title, he shall immediately transmit to the Congress a report specifying--

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

(c) At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) with respect to an exercise of authorities under this title, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b).

* * *

APPENDIX B

REJECTED DRAFT OF TWEA'S SAVINGS CLAUSE

The subcommittee working draft of the rejected language of the Amendment to TWEA read, in relevant part, as follows:

TITLE I--AMENDMENTS TO THE TRADING WITH THE ENEMY ACT

Removal of National Emergency Powers Under The Trading With The Enemy Act

Sec. 101. (a) Section 5(b)(1) of the Trading with the Enemy Act is amended by striking out "or during any other period of national emergency declared by the President" in the text preceding subparagraph (A).

(b) Notwithstanding the amendment made by subsection (a)--

(1) any authority conferred upon the President by section 5(b) of the Trading with the Enemy Act, which is being exercised with respect to a set of circumstances on the date of enactment of this Act as a result of a national emergency declared by the President before such date of enactment, may continue to be exercised with respect to such set of circumstances; and

(2) any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances;

subject to the termination provisions of title I of the National Emergencies Act.

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ALEXANDER L. STEVAS,
CLERK

No. 83-436

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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1. The question raised by this case is the proper scope of the grandfather clause, Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625, giving the President continuing power to exercise certain authorities under the Trading With the Enemy Act, 50 U.S.C. App. 1 *et seq.* In the section of respondents' brief in opposition titled "*Statutory Language*" (Br. in Opp. 22-26), respondents state that the grandfather clause continues "only those prohibitions and restrictions 'being exercised' on July 1, 1977" (*id.* at 22) and permits the President only to impose "existing *prohibitions*" (*id.* at 25; emphasis in original). But the grandfather clause does not say that existing "prohibitions" and "restrictions" may continue; it says that the President may continue to use the "*authorities*" conferred on him by the TWEA and being exercised on July 1, 1977. The problem of this case is whether, by this language, Congress intended to

freeze the precise restrictions in place on July 1, 1977, or whether Congress's explicit purpose —to grandfather existing embargoes in order to avoid the need to declare a new emergency with respect to Cuba (and Vietnam, Cambodia, and North Korea) (see Pet. 23-24) — encompasses the traditional authority to modify those embargoes in light of changing foreign policy needs. That problem of interpretation cannot be made to disappear by the simple ipse dixit of substituting the words "prohibitions and restrictions" for the term "authorities" in paraphrases of the statutory language.

2. Respondents state that the government is "challenging * * * the mandate of Congress in IEEPA" and that our "arguments are directed at IEEPA as a whole" (Br. in Opp. 19); they contend that the solution to this case is for the President to "use * * * IEEPA" (*id.* at 21).

In fact, the government has no quarrel with the procedures Congress has required under IEEPA, which the government has used in connection with newly developed foreign policy crises (*e.g.*, the Iranian hostage situation). What we have asserted is that, for the President to declare a *new* "national emergency" with respect to Cuba because the Cuban situation presents an "unusual and extraordinary threat * * * to the national security, foreign policy, or economy of the United States" (50 U.S.C. (Supp. V) 1701), would be a grave step with serious foreign policy implications. That assertion should not be casually disparaged by those who have no responsibility for carrying on the foreign policy of the United States. Whether the declaration required by IEEPA should be made for the purpose of modifying a long-existing embargo is precisely the question the President will face if certiorari is denied in this case. Our submission, simply, is that the President should not be forced to decide that question without an authoritative ruling by this Court whether the court of appeals was

correct in concluding that the grandfather clause, rather than preserving the Cuban embargo as an on-going system of prohibitions subject to adjustment, in effect created a *two*-track system for dealing with property transactions involving Cuba — one under the pre-existing national emergency declaration under the TWEA, which authorizes restrictions on the purchase of Cuban machinery, sugar, and cigars, and a second, under which a new and different national emergency declaration would have to be made to restrict the purchase of Cuban hotel and airline space by ordinary tourists and business people wishing to visit Cuba.

In sum, the question before the Court is not whether the IEEPA procedures are sound or desirable, but whether they apply to modifications of the pre-existing Cuban embargo. That is an important question, with significant implications for the flexibility available to the President in the management of our difficult and sensitive relations with the Government of Cuba.

3. Respondents issue a dark warning that if the Court grants certiorari, this "would require" (Br. in Opp. 38) the Court to decide several statutory and constitutional questions raised by the respondents below.

It is true that respondents raised various statutory and constitutional objections to the regulations at issue in this case, in addition to the contention accepted by the court of appeals. And we assume that if this Court should decide that the President's authority to issue these regulations was grandfathered, respondents' additional statutory and constitutional objections to the regulations might then come into play. But it is not true that this Court would be "require[d]" to decide these issues or would "have to reach" them (Br. in Opp. 38, 39). These issues were not passed on by the court of appeals, and could in the first instance be considered by it on remand.

In any event, it seems anomalous to ask the Court to deny certiorari on an important and grave question affecting the Executive's foreign policy authority, on the ground that there are *other* important and grave questions potentially raised by this case. The purpose of the certiorari jurisdiction is to afford the Court the discretion to focus on important cases; respondents' additional contentions do not detract from, but rather add to, the public significance of this litigation.

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

NOVEMBER 1983

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No. 83-436

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625, provides that the "authorities * * * being exercised" with respect to a country on July 1, 1977, under Section 5(b) of the Trading With the Enemy Act may continue to be exercised with respect to that country thereafter. On July 1, 1977, Treasury Department regulations prohibited all unlicensed property transactions related to Cuba, and a general license authorized many (but not all) travel-related transactions involving Cuba. The question presented is whether, under Section 101(b), the President may narrow the terms of this general license and restrict travel-related economic transactions involving Cuba.

PARTIES TO THE PROCEEDINGS

In addition to Donald Regan, Secretary of the Treasury, the following are also petitioners: John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations; Dennis M. O'Connell, Director, Office of Foreign Assets Control, Department of the Treasury; George P. Shultz, Secretary of State; and Ronald Wilson Reagan, President of the United States. In addition to Ruth Wald, the following are also respondents: Marian Lowe, Rosario Morales, Francis E. Bradley, Reverend Alice Hageman, Cuba Resources Group, Robert C. Howard, Center for Cuban Studies, and Linda Turner.

Intervening plaintiffs in the district court were Puerto Rico Olympic Committee and Rafael Morales Cabranes, on his own behalf and on behalf of the Asociacion de Turistas Olimpicos de Puerto Rico (Atoprico), and other Puerto Rican sports fans. The intervening plaintiffs did not participate in the court of appeals.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) and the memorandum of the court of appeals accompanying its order denying rehearing (Pet. App. 15a-19a) are reported at 708 F.2d 794. The order of the district court denying a motion for preliminary injunction (Pet. App. 22a-23a) and the magistrate's report recommending denial of the motion for preliminary injunction (Pet. App. 24a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on May 16, 1983. A timely petition for rehearing was denied on June 16, 1983 (Pet. App. 20a). The petition for a writ of certiorari was filed on September 14, 1983, and was granted on November 28, 1983 (J.A. 197). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are reproduced at App. 1a-12a, *infra*.

STATEMENT

A. Background of the Challenged Regulation

1. The United States does not enjoy—and for a quarter century has not been able to enjoy—normal relations with the Government of Cuba; and the management of relations with Cuba has posed some of the most difficult, sensitive and troublesome foreign policy problems presented to our government.[1] Throughout this time it has been an important objective of United States foreign policy to discourage the Cuban Government from activities inimical to the interests of the United States and its allies, particularly Cuban attempts to subvert and destabilize governments in Central America and the Caribbean region.[2] To this end, the United States has for

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[1] Declaration of Myles R.R. Frechette, Director, Office of Cuban Affairs, Department of State ¶ 4 (J.A. 107). A principal objective of the Cuban Government has been the overthrow of non-Communist governments in the western hemisphere. Declaration of Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs ¶ 5 (J.A. 172). In particular, since 1978 Cuba, with the political, economic, and military support of the Soviet Union, has provided widespread support for armed violence and terrorism in the western hemisphere; in addition, Cuba maintains close to 40,000 troops in various countries in Africa and the Middle East in support of objectives inimical to United States foreign policy interests. Frechette Declaration ¶ 4 (J.A. 107).

The declaration of Mr. Frechette was submitted to the district court in connection with the government's response to respondents' motion for preliminary injunction. The declarations of Assistant Secretary Enders and other government officials, which update and expand declarations submitted to the district court, were filed in the court of appeals and in this Court in connection with the government's applications for stay of the mandate. We draw on these declarations in explaining the history and purpose of the Cuban Assets Control Program and the regulations at issue here.

[2] Declaration of James H. Michel, Acting Assistant Secretary of State for Inter-American Affairs ¶ 3 (J.A. 178); Enders Declaration ¶ 5 (J.A. 172); Frechette Declaration ¶ 4 (J.A. 107).

more than two decades maintained a delicate and extensive system of oversight over the relations of our country with Cuba and the Cuban Government.[3]

A critical constituent of this system has, since 1963, been a wide-ranging prohibition of all unlicensed property transactions between persons subject to the jurisdiction of the United States and Cuba or Cuban nationals.[4] This embargo program has given the United States some leverage over Cuban conduct.[5] By restricting Cuban access to hard currency, the program has made it more difficult for Cuba to finance destabilizing activity in Central America and the Caribbean region, and has served to dissociate the United States from these Cuban ventures.[6] During these 20 years, Presidents have made various adjustments in the embargo through amendment of the Cuban Assets Control Regulations issued by the Department of the Treasury, 31 C.F.R. Pt. 515. The embargo program has thus been a flexible instrument of foreign policy, sensitive to the particular state of relations between the United States and Cuba.[7]

2. Authority for the Cuban Assets Control Regulations derives from the Trading With the Enemy Act of

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[3] In adopting this system, the United States acted in coordination with other countries of the western hemisphere. See Resolution VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs Acting Under the Inter-American Treaty of Reciprocal Assistance (Jan. 31, 1962) and Resolution I of the Ninth Meeting of Consultation of Ministers of Foreign Affairs (July 22, 1964), *reprinted in* II *Inter-American Treaty of Reciprocal Assistance Applications, 1948-72*, at 77-78, 215-216 (General Secretariat, Organization of American States 1973). See *Zemel* v. *Rusk*, 381 U.S. 1, 14-15 & n.15 (1965).

[4] Enders Declaration ¶ 6 (J.A. 172-173); June 23, 1983, Declaration of John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations ¶ 3 (J.A. 184).

[5] Michel Declaration ¶ 3 (J.A. 178-179).

[6] *Ibid.*; June 23, 1983, Walker Declaration ¶ 3 (J.A. 184).

[7] See page 31, *infra*; Pet. 20-21 nn. 32-33. Parallel regulatory provisions governing embargoes against North Korea, Vietnam, and Cambodia (Kampuchea) appear in the Foreign Assets Control Regulations, 31 C.F.R. Pt. 500.

1917 (TWEA), 50 U.S.C. App. 1 *et seq.*[8] Prior to its amendment in 1977, Section 5(b) of the TWEA, 50 U.S.C. App. 5(b), gave the President, "[d]uring the time of war or during any other period of national emergency declared by the President," authority

> under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise [to]—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, * * *.

Section 5(b) thus gave the President extensive powers to impose wide-ranging economic measures during peacetime national emergencies as well as in times of war.[9]

---

[8] The Cuban Assets Control Regulations also are issued under the authority of the Foreign Assistance Act of 1961, 22 U.S.C. 2370(a), which authorizes the President to establish and maintain a total embargo on all trade between the United States and Cuba. However, TWEA authority is of primary importance because it provides for various enforcement tools, such as subpoena power, mandatory recordkeeping, and criminal penalties, and permits the blocking or "freezing" of assets and control of certain financial transactions unrelated to trade that might not be reached under the Foreign Assistance Act of 1961.

Violation of regulations promulgated under the TWEA constitutes a felony punishable by imprisonment of not more than 10 years and/or a fine of not more than $50,000. 50 U.S.C. App. (Supp. V) 16. There are no civil penalties for violations of the regulations.

[9] The TWEA was passed during World War I. Act of Oct. 6, 1917, ch. 106, 40 Stat. 411. Originally it authorized use of the specified economic powers only during times of war. In 1933, Sec-

In 1976 Congress enacted the National Emergencies Act, 50 U.S.C. 1601 *et seq.*, which provided for termination in 1978 of previously declared national emergencies and established new procedures for declaring national emergencies in the future. However, Congress exempted certain statutes, including TWEA Section 5(b), from the operation of the National Emergencies Act. 50 U.S.C. 1651(a)(1). Congress concluded that, because Section 5(b) constituted the authority for continuing foreign policy programs, further study was necessary to determine how those programs would be affected by terminating previously declared national emergencies. See H.R. Rep. 95-459, 95th Cong., 1st Sess. 6-7 (1977). It was after such study, in 1977, that Congress finally decided to create a new procedural framework for the President's exercise of peacetime emergency economic powers by enacting Pub. L. No. 95-223 (Public Law 95-223), 91 Stat. 1625 *et seq.*

Title I of the new statute amended the TWEA to confine—(with the exception of certain grandfathered authorities)—the President's use of Section 5(b) powers to periods of war. Title II of Public Law 95-223, known as "IEEPA"—the International Emergency Economic Powers Act, 50 U.S.C. (Supp. V) 1701 *et seq.*[10]—established new predicates and procedures for the President's peacetime exercise of international emergency economic powers. Under IEEPA, the President has authority to exercise such powers only if there exists "any unusual and extraordinary threat, which has its source * * * outside the United

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tion 5(b) was amended to extend those powers to times of peacetime national emergency. Act of Mar. 9, 1933, ch. 1, 48 Stat. 1. See *Tagle* v. *Regan*, 643 F.2d 1058 (5th Cir. 1981) (historical discussion).

The President has delegated his authority under the TWEA to the Secretary of the Treasury, who in turn has delegated that authority to the Office of Foreign Assets Control. See Exec. Order No. 9193, 3 C.F.R. 1174, 1175 (1942); Treasury Dep't Order No. 128 (Rev. 1, Oct. 15, 1962).

[10] References to 50 U.S.C. in connection with Public Law 95-223 will hereafter omit "Supp. V."

States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such a threat." 50 U.S.C. 1701. The President has to report to Congress every six months on such an emergency. Once such an "unusual and extraordinary threat" is found to exist, however, the President has—with certain qualifications—the same broad powers under IEEPA that he had under the TWEA.[11]

At the same time it altered the scheme governing the President's exercise of powers during future peacetime national emergencies, Congress carefully provided for *continuation* of presidential authority under TWEA Section 5(b) to exercise economic powers with respect to those countries—Cuba, North Korea, Vietnam, and Cambodia (Kampuchea)—for which financial and trade transactions were currently subject to embargo. Congress decided that the President should not be required to declare a new national emergency in order to continue these existing foreign embargo programs, so long as he determined annually that continuation of such a program was in the national interest. Congress therefore included a "grandfather clause" in Title I of Public Law

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[11] Under the TWEA, the existence of one declared emergency was a sufficient predicate for exercise of any of the authorities provided under the Act with respect to any country. Under IEEPA, the President must declare a new national emergency with respect to each specific threat (using the procedures established by the National Emergencies Act) before initiating the exercise of emergency economic powers with respect to that threat. 50 U.S.C. 1703. Under the National Emergencies Act, Congress purported to retain the power to terminate a declared national emergency by concurrent resolution. 50 U.S.C. 1622. Such termination apparently would cut off the use of emergency authorities. 50 U.S.C. 1706(b). But see *INS* v. *Chadha*, No. 80-1832 (June 23, 1983).

Under IEEPA, the President does not have the power to vest foreign assets (*i.e.*, to place ownership in the United States), to regulate purely domestic transactions, or to seize records, as he did under Section 5(b) of the TWEA. See H.R. Rep. 95-459, 95th Cong., 1st Sess. 14-15 (1977). (Legislative materials relating to Public Law 95-223 were reproduced in a Legislative History Appendix filed by the parties in the court of appeals.)

95-223, which preserves the Section 5(b) authorities being exercised with respect to a country as of July 1, 1977. The grandfather clause—Section 101(b) of Public Law 95-223, 91 Stat. 1625—provides (emphasis added):

> [T]*he authorities conferred upon the President by section 5(b)* of the Trading With the Enemy Act, *which were being exercised with respect to a country on July 1, 1977*, as a result of a national emergency declared by the President before such date, *may continue to be exercised with respect to such country*, except that, unless extended, the exercise of such authorities shall terminate * * * at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [September 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

Pursuant to the grandfather clause, Presidents Carter and Reagan have in every year since 1978 determined that it is in the national interest to continue the exercise of TWEA authorities with respect to Cuba, North Korea, Vietnam, and Cambodia.[12]

3. Section 5(b) of the TWEA delegates to the President wide authority to "regulate, direct and compel, nullify, void, prevent, or prohibit" any "transfer" of any "property" or any "transactions involving any property" in which "any foreign country or a national thereof has any interest." Pursuant to this authority, ever since 1963 the Cuban Assets Control Regulations have prohibited, "except as specifically authorized by the Secretary of the Treasury * * * transactions involv[ing] property in which [Cuba] has * * * any interest of any nature whatsoever, direct or indirect * * *." 31 C.F.R. 515.201(b); 28 Fed. Reg. 6975 (1963). The effect of this sweeping groundrule regulation—which we will

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[12] See 48 Fed. Reg. 40695 (1983); 47 Fed. Reg. 39797 (1982); 46 Fed. Reg. 45321 (1981); 45 Fed. Reg. 59549 (1980); 44 Fed. Reg. 58153 (1979); 43 Fed. Reg. 40449 (1978).

hereafter refer to, simply, as "Regulation 201(b)"—is to subject *all* property transactions involving Cuba, and engaged in by persons subject to United States jurisdiction, to a comprehensive regulatory licensing regime. Regulation 201(b) prohibits persons subject to United States jurisdiction from engaging directly or indirectly in unlicensed economic transactions *of any kind* with Cuba or Cuban nationals, including transactions incident to travel to and within Cuba.[13] *Regulation 201(b) was in force on July 1, 1977, and continues in full force and effect today.*

The Cuban Assets Control Regulations further provide (and have at all relevant times provided) that any regulation or license "may be amended, modified, or revoked at any time" (31 C.F.R. 515.805; 28 Fed. Reg. 6985 (1963)).[14]

In March 1977, President Carter decided to modify United States policy with respect to economic transactions incident to travel to Cuba. Accordingly, the Department of the Treasury promulgated 31 C.F.R. 515.560 (1977), 42 Fed. Reg. 16621 (1977), which constituted a general license ("the 1977 general license") authorizing transactions "ordinarily incident to" travel to and within Cuba.[15] It gave permission to persons visiting

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[13] See 31 C.F.R. 515.310, 515.311; see further pages 20-21 note 21, *infra*.

[14] The regulations also specify that "[a]ny transfer * * * which is in violation of any provision of this part or of any regulation * * * license or other direction or authorization * * * and involves any property in which a designated national has or has had an interest * * * is null and void * * *" (31 C.F.R. 515.203(a); 28 Fed. Reg. 6975 (1963)).

[15] The general license, 31 C.F.R. 515.560(a) (1977), provided in part:

> The following transactions are authorized:
>
> (1) All transactions ordinarily incident to travel to and from Cuba.

Cuba to pay for their transportation and living expenses (*e.g.*, meals, hotel bills, taxis) while in Cuba. However, the 1977 general license prohibited (i) such persons from buying and bringing back to the United States more than $100 worth of Cuban goods for personal use, 31 C.F.R. 515.560(a)(3) (1977), (ii) transactions incident to regularly scheduled flights and voyages to and from Cuba, 31 C.F.R. 515.560(a)(5) (1977), and (iii) domestic credit card issuers from entering into contracts with Cuban enterprises for issuing credit to travelers, 31 C.F.R. 515.560(a)(7) (1977). And the 1977 general license was, of course, continuously subject to the general provisions of 31 C.F.R. 515.805, providing that any regulation or license issued in connection with the Cuban Assets Control Program may be "amended, modified, or revoked" at any time.

In late 1981, it became apparent to the United States that the Cuban Government was increasing its efforts to destabilize Central American governments and at the same time was initiating a program to increase its hard currency earnings by attracting tourists from the United States.[16] In May 1982, in order to "reduce Cuba's hard currency earnings from travel by United States persons to and within Cuba," the Department of the Treasury amended 31 C.F.R. 515.560 to modify the 1977 general license for travel-related economic transactions involving Cuba. 47 Fed. Reg. 17030 (1982).[17] It is this modifica-

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(2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person, for personal use only. Such merchandise may not be resold. The authorization in this subparagraph may only be used once in every six consecutive months.

[16] See pages 34-35, *infra*.

[17] In July 1982, 31 C.F.R. 515.560 was further amended to clarify the scope of the general and specific licenses and the meaning of certain terms. 47 Fed. Reg. 32060 (1982).

tion that is at issue here. As amended, Section 515.560 provides that the general license to engage in travel-related transactions is limited to persons engaged in official travel, visits to close relatives, "fully sponsored or hosted" travel (*i.e.*, travel that does not involve transfer of economic benefit from Americans to Cuba), and travel related to news-gathering, professional research, or similar activities. The amended regulation also provides that specific licenses may be granted in the case of travel for humanitarian reasons or for purposes of public performances in Cuba in connection with cultural or sports events. The general effect of the amendments was to adjust the 1977 general license by withdrawing authorization for transactions incident to ordinary private business and tourist travel.

B. Proceedings in the Courts Below

1. In June 1982, respondents, who are individuals interested in travel to Cuba and two groups that organize tours to Cuba, filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Massachusetts.[18] Respondents claimed that

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[18] One respondent, the Center for Cuban Studies, applied to the Office of Foreign Assets Control of the Department of the Treasury for a license to permit 98 named individuals to engage in transactions relating to an interdisciplinary study tour. That blanket application was denied, but the Office of Foreign Assets Control invited the individual applicants to provide more specific information that would allow the Office to determine whether their proposed travel might be covered by a general or specific license under the 1982 regulation. See J.A. 69-70. (Subsequently, 45 persons filed individual applications; of these, 38 were informed that they qualified for a license, primarily as professional researchers. The Office rejected three of the applications and did not act on four others because they were withdrawn or because there was no response to the Office's request for additional information.) Respondent Bradley sought a license that would allow him to travel to Cuba with a group of high school students. See J.A. 82-83. The Office of Foreign Assets Control denied the application on the ground that the proposed trip did not fall within either the general or specific

the restrictions on travel-related economic transactions imposed by the May 1982 amendment to the 1977 general license violated 22 U.S.C. 211a, which prohibits area restrictions on passports except in certain circumstances; exceeded the authority conferred by Section 5(b) of the TWEA and by IEEPA; had not been promulgated pursuant to IEEPA procedures; and violated respondents' First Amendment and due process rights, including their right to travel.

Respondents' request for a preliminary injunction was referred to a magistrate.[19] Following briefing and argument, the magistrate recommended that a preliminary injunction be denied (Pet. App. 24a-44a). He concluded that Congress did not, by the grandfather clause, intend to freeze in place only the specific restrictions that happened to be in effect on July 1, 1977 (*id.* at 36a). Because transactions related to Cuban travel were being regulated on that date (albeit by a regulation authorizing most such transactions by general license), the magistrate concluded that the grandfather clause gave the President the authority in 1982 to change the scope of that regulation (*ibid.*). The magistrate also concluded that an injunction against enforcement of the regulation would cause irreparable injury to the government's conduct of its foreign affairs and that that injury out-

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licenses authorized by the regulations (J.A. 128-129). The other respondents did not apply for licenses.

Respondents named Ronald Wilson Reagan, President of the United States, as a defendant in the district court. We believe President Reagan is not a proper party to this suit. See, *e.g.*, *Meyers* v. *Nixon*, 339 F. Supp. 1388, 1391 (S.D. N.Y. 1972); *Atlee* v. *Nixon*, 336 F. Supp. 790 (E.D. Pa. 1972). However, the decisions below were issued on respondents' motion for preliminary injunction, prior to the filing of an answer or any motion for dismissal of parties. Because President Reagan was named as a party below, we have included him as a petitioner in this Court. See Sup. Ct. R. 19.6.

[19] In the meantime, respondent Bradley obtained a temporary restraining order permitting him to travel to Cuba pending a hearing on the motion for preliminary injunction. See Pet. App. 45a.

weighed any inconvenience to respondents resulting from postponement of their planned travel (*id.* at 40a-42a).

After considering written and oral objections to the magistrate's report, the district court denied the motion for a preliminary injunction (Pet. App. 22a-23a). The court concluded that respondents were not likely to succeed on the merits of either their statutory or constitutional claims.

2. The court of appeals vacated the district court's order and remanded with instructions to issue a preliminary injunction against enforcement of 31 C.F.R. 515.560 (Pet. App. 1a-14a). It concluded that the grandfather clause did not authorize the 1982 amendment to the 1977 general license, that the government had failed to follow IEEPA procedures in amending that regulation, and that the amended regulation was therefore invalid. The court declined to reach respondents' other statutory and constitutional contentions.

The court of appeals' holding that the grandfather clause did not authorize the 1982 amendment to the 1977 general license was based on its conclusion that on July 1, 1977, the Treasury Department was "*not* restricting *travel* to Cuba" (Pet. App. 4a) (emphasis in original). The court recognized that on that date the government was restricting commodity transactions involving Cuba, but opined that restrictions on travel-related transactions constituted a "very different 'exercise[]' of authority" (*id.* at 5a). The court found support for its holding in this Court's directives to lower courts to construe narrowly all delegated powers that curtail the right to travel (*id.* at 11a-12a). The court stated that its holding would not prevent the President from regulating travel-related property transactions, since he could use IEEPA procedures to do so (*id.* at 12a), and that a narrow construction of the grandfather clause would be consistent with Congress's overall intent to "impos[e] Congressional limits upon the President's restrictive powers," reflected in, inter alia, the 1978 amendment to the Passport Act (*id.* at 12a-13a).

The court of appeals denied the government's petition for rehearing and suggestion for rehearing en banc, as well as its request for stay of the mandate (Pet. App. 15a-20a). The court rejected the government's submission that the combination of controls that the President had in force on July 1, 1977—(i) a general prohibition on all unlicensed property transactions with Cuba (Regulation 201(b)), (ii) a revocable general license giving permission for many travel-related property transactions (the 1977 general license), and (iii) continuing restrictions on some travel-related transactions not authorized by the 1977 general license—did, together, constitute "exercise" of the "authority" to regulate travel-related (as well as all other property) transactions involving Cuba. The court acknowledged that "others could reasonably conclude that the legislative history is ambiguous and should be read differently;" but the court doubted that "a reasonable reader could conclude that the relevant legislative history *clearly* supports the government" (*id.* at 19a).

On July 6, 1983, this Court granted the government's application for a stay of the mandate (Brennan, J., and Stevens, J., dissenting).

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the court of appeals invalidated an important component of the Cuban Assets Control Program and thereby placed an unwarranted restriction on the President's authority to carry out our country's foreign policy toward Cuba. Under this program succeeding Presidents have, continuously since 1963, used TWEA authority comprehensively to regulate economic transactions with Cuba, as one element in the management of our delicate and difficult relations with the Government of Cuba. The court of appeals held that this TWEA authority may not be used to adjust the regulations with respect to those economic transactions that are related to travel to Cuba. Instead, the court of appeals held, travel-related economic transactions may only be regulated pur-

suant to a new, separate, "national emergency" with respect to Cuba to be declared by the President under IEEPA. This must be done, said the court of appeals, even though other property transactions involving Cuba may continue to be regulated by the President pursuant to his grandfathered authorities under the TWEA—authorities that Presidents Carter and Reagan have annually renewed as being in the national interest ever since the passage of the grandfather clause.

The court of appeals' holding is based on a narrow and artificial reading of the governing statutes and regulations. It means that restrictions on the purchase of Cuban cigars may continue to be imposed under the TWEA, whereas restrictions on the purchase of Cuban hotel rooms and restaurant meals must be imposed pursuant to a new, separate, national emergency, to be declared by the President with respect to Cuba under IEEPA. It apparently also means that the restrictions imposed by the TWEA embargo with respect to Cuba—and, presumably, those with respect to North Korea, Vietnam, and Cambodia—are "frozen" as of July 1, 1977, and may not be adjusted in light of changing foreign policy circumstances. Such a reading makes no sense; is inconsistent with Congress's intent; and creates undesirable rigidities in the conduct of our foreign relations.

Our central submission is straightforward: on July 1, 1977, the President was exercising comprehensive TWEA authority to regulate *all* property transactions with Cuba; encompassed within this authority was the power to adjust the Cuban Assets Control Program in light of changing foreign policy needs; the authority to continue to regulate—and to adjust—was expressly grandfathered; and there exists no reason to carve the power to regulate travel-related economic transactions out of this comprehensive regulatory regime and to constitute it as a "separate" authority to be regulated under a new national emergency declaration under a separate statute.

1. A natural and sensible reading of the grandfather clause indicates that Congress intended to preserve the President's TWEA authority to regulate travel-related economic transactions involving Cuba. The "authorities * * * being exercised" with respect to Cuba on July 1, 1977, included Regulation 201(b), which constitutes a comprehensive prohibition on all unlicensed property transactions between persons subject to United States jurisdiction and Cuba or Cuban nationals. That broad prohibition reaches both trade in commodities (sugar, or cigars) and economic transactions relating to Cuban travel.

In March 1977 President Carter exercised his licensing authority to ease the broad restriction on travel-related transactions by promulgating a revocable and qualified general license permitting most such transactions. But the temporary loosening of the restriction itself constituted an exercise of the President's Section 5(b) authority to regulate property transactions by "means" of "licenses." Assets control programs have traditionally operated through a combination of a broad general prohibition, which remains in place during the life of a program, and a flexible licensing scheme, which is used to adjust the program; permitting transactions by license cannot be characterized as an absence of regulation.

The court of appeals concluded that Congress intended to distinguish between the authority to regulate travel-related transactions and the authority to regulate "more typical" commercial transactions (Pet. App. 5a). But there is no basis, either in the statute or in common sense, for this disaggregation of Section 5(b) authority. Nor is there any basis for the court's conclusion that a class of transactions can be restricted pursuant to grandfathered TWEA authority only if such transactions were in fact prohibited on July 1, 1977. The grandfather clause refers not to preservation of "restrictions" or "prohibitions," but to preservation of "authorities."

2. Foreign assets control programs have traditionally operated in a flexible manner to meet changing foreign

policy needs. It is against that background that Congress enacted the grandfather clause; it is thus implausible that Congress intended through that clause to freeze into place a static set of prohibitions. It is doubly implausible in light of the fact that TWEA programs are intimately connected to national security and foreign policy interests of the United States. Courts have recognized that the Executive needs considerable flexibility in these areas; accordingly, they have construed generously statutes relating to these subjects. The court of appeals' suggestion that the President could simply use IEEPA procedures to promulgate the same regulation ignores the fact that the effect of a declaration of a new national emergency might itself have grave foreign policy implications. Finally, the Treasury Department has consistently construed the grandfather clause as preserving the President's flexibility to adjust assets control programs; that interpretation by the agency charged with administration of the statute should be accorded deference.

3. The legislative history makes it clear that Congress intended the new IEEPA procedures to apply only to *future* emergencies, and that it enacted the grandfather clause so that the President could continue to administer existing assets control programs under TWEA authority without taking the awkward and inappropriate step of declaring new national emergencies with respect to countries such as Cuba and Vietnam. The legislative history lends no support to the conclusion that Congress was grandfathering simply a frozen set of prohibitions. Nor is there any evidence that Congress viewed the President's power to regulate travel-related economic transactions as based on a separate "authority" from that governing regulation of other property transactions for purposes of the grandfather clause. The legislative history thus supports the conclusion that the President may use grandfathered TWEA authority to make the adjustments in the Cuban Assets Control Program at issue in this case.

4. The court of appeals erred in concluding that constitutional considerations support its narrow construction

of the grandfather clause because the regulation at issue has an incidental effect on travel. Neither Section 5(b) nor the grandfather clause regulates travel as such; nor does either single out travel-related economic transactions for special treatment. Rather, they regulate economic transactions in the broad context of an overall embargo program subjecting our financial and commercial relations with Cuba to comprehensive regulatory monitoring. The purpose of the regulation is not to restrict Americans' freedom of movement but to deny economic benefits to a country engaged in activities inimical to the United States. The court of appeals itself acknowledged that Congress authorized the regulation of travel-related economic transactions with Cuba under IEEPA. The question of statutory construction in this case is, therefore, whether such regulation may proceed under grandfathered TWEA authority or must proceed under IEEPA; constitutional considerations are not relevant to such a choice and should not be used artificially to narrow the President's TWEA authorities.

In any event, the national security and foreign policy interests underlying the Cuban Assets Control Program provide ample constitutional space for the narrowly drawn incidental restrictions the regulations place on travel to Cuba.

The 1978 amendment to the Passport Act does not call for a narrow construction of the grandfather clause. That amendment on its face is addressed only to passport restrictions imposed by the Secretary of State; there is no indication that Congress meant by that Act to repeal a portion of the grandfathered TWEA authority exercised by the Secretary of the Treasury to regulate economic transactions.

ARGUMENT

THE GRANDFATHER CLAUSE PRESERVED THE PRESIDENT'S TWEA AUTHORITY TO REGULATE TRAVEL-RELATED ECONOMIC TRANSACTIONS INVOLVING CUBA

I. Authority To Regulate Travel-Related Economic Transactions Was Encompassed By The TWEA "Authorities" Being "Exercised" With Respect To Cuba On July 1, 1977, And Was Therefore Preserved By The Grandfather Clause

The key question in this case is whether the TWEA Section 5(b) "authorities" being "exercised" with respect to Cuba on July 1, 1977, encompassed authority to regulate travel-related economic transactions. Section 5(b) gave the President the power to "regulate," "prevent" and "prohibit" "*any*" transaction involving "*any*" property in which Cuba or Cubans had "*any*" interest. Pursuant to Section 5(b), ever since 1963 and up to this day, all our Presidents have continuously prohibited—by Regulation 201(b)—*all* transactions involving property in which Cuba has "any interest of any nature whatsoever, direct or indirect"—*unless "specifically authorized"* by the Secretary of the Treasury. The existence in 1977 of Regulation 201(b) alone establishes that the President was affirmatively "exercis[ing]" TWEA Section 5(b) authority to "regulate" *all* United States property transactions with respect to Cuba, and that the authority to do so was, consequently, expressly grandfathered.

A. Congress did not need to define the term "authorities" when it provided in the grandfather clause that Section 5(b) "authorities" being exercised with respect to a country on July 1, 1977, were to be preserved. Those authorities are specified in Section 5(b) itself. They include the power comprehensively to exercise plenary regulatory control over ("regulate, direct and compel, nullify, void, prevent or prohibit") *all* property transactions. This control may be exercised through such "rules and

regulations" as the President may prescribe and "by means of instructions, licenses, or otherwise." There is no good reason not to give these terms their plain and sensible meanings.

We believe that one possible reading of the grandfather clause is that if the President is exercising any Section 5(b) authority with respect to a country on July 1, 1977, he may continue to exercise all 5(b) authorities with respect to that country. This construes the term "authorities * * *, which were being exercised with respect to a country on July 1, 1977" as delimiting the *countries* that may continue to be the objects of a TWEA embargo. This reading gives generous scope to Congress's clearly expressed purpose not to interfere with the President's power to carry forward then-existing embargo programs (see pages 38-52, *infra*).

Alternatively, even if the language is read to suggest that Congress meant to delimit "authorities" not only with respect to target countries, but also with respect to the regulatory tools being used on July 1, 1977, the most natural interpretation is to define the relevant categories of authority in terms of the broad classifications adopted in Section 5(b) itself: (i) authority to control currency, bullion, and securities transactions, as specified in Section 5(b)(1)(A); (ii) authority to control transactions involving property in which a foreign nation or its nationals have any interest, as specified in Section 5(b)(1)(B); and (iii) authority to vest foreign-owned property, as specified in the text of Section 5(b)(1) following subsection (B).[20] On this reading, since the Cuban Assets Control Regulations concededly exercised the authority to control property transactions pursuant to Section 5(b)(1)(B), all such 5(b)(1)(B) authority was being "exercised" on July 1, 1977, and was therefore grandfathered, so that the regulation at issue here—plainly encompassed by Section 5(b)(1)(B)—is valid.

[20] As detailed below, see pages 46, 48, *infra*, the legislative history includes some references to these broad classes of controls.

There is no basis for assuming that when Congress grandfathered Section 5(b) "authorities" being "exercised" with respect to a country, it was referring not to categories of authorities as these are specified in Section 5(b) itself, but rather to classes of goods and services ("sugar" vs. "hotel rooms") being regulated. More specifically, as we further detail below, there is no indication that Congress viewed the President's power to regulate travel-related transactions as based on a separate "authority" from that governing regulation of other property transactions for purposes of the grandfather clause. Section 5(b) is simply not organized in terms of such subject-matter categories; and it is to *Section 5(b)* "authorities" that the grandfather clause refers.

But even if one assumes that Congress intended to preserve the authority to regulate a given subject matter only if that subject matter was subject to a regulatory authority being exercised through the Cuban Assets Control Regulations as they stood on July 1, 1977, the authority to regulate travel-related transactions was grandfathered. An examination of Regulation 201(b) shows that it affirmatively asserts the regulatory authority to decide whether to permit or prohibit *all* property transactions between persons subject to the jurisdiction of the United States and Cuba or Cuban nationals. If this is not an exercise of the "authority" to "regulate" (and to "prevent" and "prohibit") all such transactions, what is? The program established by Regulation 201(b) includes the familiar features of a trade embargo. But it also plainly encompasses all other property transactions, including travel-related economic transactions.[21]

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[21] Payment of funds directly to Cuba or Cuban nationals for meals, lodging or transportation represents the discharge of an indebtedness for goods or services provided and thus is a transaction with respect to property in which Cuba has an interest, as is payment of funds to non-Cuban entities (*e.g.*, an airline) that in turn remit proceeds to Cuba or pay fees to Cuba.

The terms "property," "interest in property," and "transfer" are defined broadly under the regulations. For example, "property" is

Since its promulgation in 1963, the Department of the Treasury has consistently interpreted Regulation 201(b) as encompassing a prohibition on travel-related transactions and has required licenses for persons who wish to engage in such transactions.[22]

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defined to include, inter alia, "money, checks, drafts, * * * debts, indebtedness obligations, * * * contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent" (31 C.F.R. 515.311; 28 Fed. Reg. 6977 (1963)). "Transfer" is defined to include "any * * * transaction * * * whether or not done or performed within the United States, the purpose, intent, or effect of which is to * * surrender, release, [or] transfer * * * any * * * interest with respect to any property * * * includ[ing] the making, execution, or delivery of any * * * check * * *" (31 C.F.R. 515.310; 28 Fed. Reg. 6976-6977 (1963)).

[22] Beginning in 1963, it was routine practice for the Office of Foreign Assets Control to issue specific licenses to named individuals to engage in economic transactions in connection with authorized travel to Cuba. For an example of such a license, see Exhibit B to our supplemental brief filed in the court of appeals.

Since Regulation 201(b) was promulgated, the Treasury Department has sought to secure compliance with the prohibition on travel-related property transactions by, inter alia, investigating persons known to have traveled to Cuba, sending questionnaires to United States businesses with foreign subsidiaries conducting licensed trade with Cuba, and sending letters to various travel magazines, travel agencies, airlines and individuals warning them of the controls and license requirements. See *United States-Cuba Trade Promotion: Hearing Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess. 44-46 (1976) (statement of Stanley Sommerfield, Acting Director, Office of Foreign Assets Control, Dep't of the Treasury). See also June 3, 1983, Walker Declaration ¶ 3 (J.A. 159); Frechette Declaration ¶ 6 (J.A. 107).

In addition, 31 C.F.R. 515.559(a)(2) (1976) expressly provided for issuance of licenses to foreign nationals who were employed by foreign subsidiaries of United States corporations and who wished to travel to Cuba in order to arrange licensed trade by the foreign subsidiaries. The State Department handout to persons authorized to travel in Cuba warned of the need to obtain a Treasury Department license in connection with payments for travel expenses, for accommodations, or for services in connection with such travel. See 8 Foreign Affairs Manual § 249.92(c) (1966).

B. The court of appeals' conclusion that the authority to regulate travel-related economic transactions was not "being exercised" on July 1, 1977, was based on a conceptual misunderstanding of the structure of the regulatory system created by the Cuban Assets Control Regulations. The court of appeals focused narrowly on the fact that in March 1977 President Carter took steps to ease restrictions on travel-related property transactions by promulgating a (revocable) general license permitting most such transactions. But the temporary loosening of those restrictions by general license was itself an exercise of the President's TWEA authorities. (Section 5(b) itself characterizes a license as a means of exercising its authorities; it permits the President to regulate "by means of instructions, licenses, or otherwise.") The 1977 general license did not revoke or alter the comprehensive regime of regulatory oversight established by Regulation 201(b). It was simply one exercise of the continuing powers of supervision asserted through that regime. It gave permission—temporary, revocable permission—to engage in certain transactions, but did not in any way exempt them from underlying and continuing regulatory control. It is one thing to act where permission is required and obtained, quite another to act where no permission is needed at all. The general prohibition of all unlicensed transactions remained in force and has been continuously asserted from 1963 to the present.

The court of appeals' assumption that the promulgation of Section 515.560 amounted to *removal* of regulation ignores the regulatory structure, which has always consisted of a combination of two regulatory instruments: a basic broad prohibition, coupled with an ongoing licensing scheme used to make particular exceptions and adjustments.[23] In fact, the 1977 general license itself

[23] Every assets freeze and trade embargo imposed by the Treasury Department since 1940 has possessed the same structure: a general *prohibition* subject to an ongoing *licensing* scheme. See pages 30-32, *infra*. The reason for combining prohibition and

maintained some continuing restrictions on travel-related transactions; for instance, economic transactions incident to travel on scheduled carriers were not allowed.[24] But even if one joins the court of appeals in ignoring those restrictions, there is no reason why only a flat prohibition specific to travel-related transactions should "count" as an exercise of authority eligible for grandfathering.[25]

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licensing is obvious. The sweeping prohibition subjects all transactions to oversight through a unified decision-making process. This is the key concept, necessary in the case of those countries with which our relations are, by hypothesis, extremely delicate and difficult. Licensing decisions then function as the expressions of ongoing foreign policy determinations. Licensing discretion—in both directions—enables the President to fine tune the embargo to meet current foreign policy needs. Sharply different from any of this is the ending of the oversight regime by the removal of the general prohibition—something that occurs when relations with the target country have become normal. Of course, no such stage has been reached in our relations with Cuba—the very fact recognized by the grandfather clause.

[24] 31 C.F.R. 515.560(a)(5) (1977). In addition, under 31 C.F.R. 515.560(a)(3) (1977), travelers were authorized to bring back no more than $100 from Cuba (for personal use only). 31 C.F.R. 515.560(a)(7) (1977) expressly excluded domestic credit card issuers from contracts with Cuban enterprises for extension of credit to travelers. 31 C.F.R. 515.601 (1977) required every person engaging in any transactions subject to the Cuban Assets Control Regulations, whether licensed or not, to keep a full and accurate record of each such transaction. 31 C.F.R. 515.602 (1977) required the production of such records "at any time as may be required by the Secretary of the Treasury."

[25] We note again that, in 1977, the Cuban Assets Control Regulations provided (as they do now) that any license granted thereunder remained at all times subject to amendment, modification, or revocation (see 31 C.F.R. 515.805). This Court has held that significant conditions can be imposed in connection with expressly revocable licenses. In *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the Court concluded that the President had authority to withdraw general licenses permitting legal actions against Iran, even to the extent of nullifying court orders of attachment issued while such licenses were in effect. (See also *Orvis* v. *Brownell*, 345

C. The court of appeals was also led to its conclusion (that "authority" to regulate travel-related economic transactions was not "being exercised" on July 1, 1977) by an imprecise and confusing amalgam of two different substantive theories about the grandfather clause. The court believed that Congress wished to make a special distinction between travel-related transactions and other sorts of economic transactions in prescribing what authorities were to be grandfathered. The court of appeals also assumed that Congress intended to grandfather only those specific prohibitions that happened to be in place on July 1, 1977—that is, that Congress meant to freeze the regulatory situation as it stood on that date. Both of those theories misapprehend the grandfather clause.

1. The court of appeals, invoking "common sense and common English" (Pet. App. 5a), opined that restricting commodity purchases and restricting travel purchases "would seem to be very different 'exercises' of authority—different enough at least not to count as the exercise of the same authority" (*ibid.*). But the court's distinction is not supported by either the statutory language or "common sense and common English." Nothing in Section 5(b) or the grandfather clause indicates that Congress perceived a distinction between the authority to regulate the purchase of, *e.g.*, Cuban hotel rooms and entertainment packages, and the authority to regulate the purchase of, *e.g.*, Cuban sugar and cigars.

Section 5(b) is subdivided into various broad categories of regulation (*e.g.*, currency regulation; regulation of property transactions); but it does not in any

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U.S. 183 (1953).) The Court characterized the attachments obtained pursuant to the general licenses as "revocable," "contingent," "specifically made subordinate to further actions which the President might take" under the applicable statute (IEEPA), and "in every sense subordinate to the President's power" under the statute. 453 U.S. at 673, 674 n.6. Those descriptions apply fully to licenses issued pursuant to the TWEA, including the 1977 general license issued in Section 515.560.

way isolate or specify as distinct the category of travel-related transactions. Rather, it simply gives the President broad authority to regulate "transactions" that involve "any property in which any foreign country or a national thereof has any interest." Restriction of travel-related transactions deprives Cuba of economic benefits just as effectively as other economic restrictions; in fact, allowing all comers freely to engage in private tourist- and business-travel transactions with Cuba would create a significant loophole in an otherwise comprehensive embargo program. The court of appeals' reading disaggregates Section 5(b) authorities in an arbitrary way, one that finds no support in Section 5(b), in the grandfather clause, or in "common sense and common English." [26]

The court of appeals suggested (Pet. App. 7a) that Congress must have viewed travel-related transactions as special because of the special constitutional interest in travel. As we show below, there is no indication of any kind in the legislative history of the grandfather clause that Congress perceived or adverted to any such special concern. And it is extremely significant that no such concern was manifested in 1977 in IEEPA itself. IEEPA provides that when new peacetime national emergencies arise, the President, following IEEPA procedures, may impose wide ranging economic measures with respect to a particular country. Congress made not the

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[26] The court of appeals cited the practice of Executive Branch agencies to support its view that historically travel restrictions have been regarded as different from "more typical TWEA rules and regulations" (Pet. App. 5a-7a). But the "practice" the court cited amounts to statements by Executive Branch representatives that the President lacked power directly to control *travel*. These statements simply do not address the problem of travel-related economic transactions, particularly in the context of a comprehensive embargo program. They certainly do not establish that, for purposes of TWEA Section 5(b) and the grandfather clause, purchase of Cuban hotel space is an entirely different category of transaction than the purchase of a Cuban cigar.

slightest attempt to provide for special treatment for travel-related economic transactions when these IEEPA powers are being exercised; they are simply thrown in with the other embargo powers that may be exercised under a IEEPA national emergency declaration. (This was, of course, implicitly acknowledged by the court of appeals when it specified that the President may regulate the purchase of Cuban hotel space and airline tickets under IEEPA.)[27] Thus, the notion that Congress intended to treat the authority to regulate economic transactions incident to travel as a distinct category of authority is affirmatively rebutted by the structure of the regulatory system that Congress adopted in 1977 to replace the TWEA.

2. Mixed in with the court of appeals' notion that Congress intended distinctive treatment for the regulation of travel-related property transactions was another, separate, strand in its analysis. The court of appeals concluded that the President was not "exercising" TWEA authority with respect to travel-related economic transactions because, on July 1, 1977, most such transactions were in fact not prohibited but were, rather, licensed pursuant to the 1977 general license. The court in effect read the grandfather clause as preserving the authority to prohibit a transaction only if that transaction was in fact prohibited on July 1, 1977.

The effect of this interpretation of the grandfather clause is, of course, to freeze into place the specific list of prohibitions that happened to be on the books on July 1, 1977. Its *reductio* implication is that if a particular regulation prohibited the importation, on July 1, 1977, of Cuban cigars but not of Cuban cigarettes, an adjustment of the embargo to include cigarettes would be im-

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[27] It is further illuminating in this respect that Congress did, in IEEPA, manifest its sensitivity to First Amendment considerations by restricting the President's authority to control "any postal, telegraphic, telephonic or other personal communication, which does not involve a transfer of anything of value." 50 U.S.C. 1702(b)(1).

proper under TWEA Section 5(b), and would require the invocation of a new national emergency under IEEPA.[28]

In parts II and III of our brief we show that the court of appeals' static interpretation of the grandfather clause is inconsistent with the traditional manner in which foreign assets control programs have always operated and with Congress's intent in enacting it. At this point we therefore limit ourselves to basic propositions deriving from the language and structure of the relevant provisions.

a. The grandfather clause provides that TWEA "*authorities*" being exercised with respect to a country on July 1, 1977, may continue to be exercised. It does *not* say that the "restrictions" or "prohibitions" in effect on July 1, 1977, may be continued. The grant of the authority to impose a prohibition is not the equivalent, linguistically or conceptually, of the prohibition itself. There is no reason why, therefore, Congress should be deemed to have used the two sorts of words and concepts interchangeably. If Congress had wished to freeze existing prohibitions into place, nothing would have been easier than to state, in the grandfather clause, that only the "restrictions" in effect on July 1, 1977, could be continued under the TWEA; and that all other "restrictions" would have to be imposed pursuant to IEEPA.

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[28] Under the court of appeals' reasoning, anomalous gaps would be created in the President's grandfathered TWEA authorities quite apart from the 1977 general license. Long before that general license was adopted, specific licenses were issued under Regulation 201(b) to specific people to engage in specific property transactions with respect to Cuba. On the court of appeals' approach to the grandfather clause, the President would be deemed not to be "exercising" TWEA authority to restrict the travel-related transactions of such a person and thus could not have restricted or revoked that particular license without a new IEEPA national emergency declaration. This example, seemingly farfetched, illustrates that there is a fundamental analytical confusion in the approach of the court of appeals, an approach that assumes that the "authorities" being exercised on July 1, 1977, consisted only of the specific *prohibitions* that were in place on that date.

How easy it is to use the terms "restrictions" or "prohibitions" is symptomized by the fact that both the court of appeals and the respondents consistently paraphrase the grandfather clause by importing into it one of those words as a substitute for the word "authorities." The court of appeals referred over and over again to the question of what "restrictions" were in effect—rather than what "authorities" were being exercised—on July 1, 1977, and to the grandfathering of "on-going restrictions" (Pet. App. 11a; see also *id.* at 4a, 5a, 7a). Respondents, too, seem unable to resist the urge to substitute the terms "prohibitions" and "restrictions" for the actual language of the grandfather clause (Br. in Opp. 22, 25). But Congress did pointedly resist the temptation to use these words and adopted one that means something else and functions conceptually in a different way. The exercise of that choice should not be ignored.

To equate "authorities" with "prohibitions" also distorts the structure of TWEA Section 5(b) itself, which specifies that the President has authority to "regulate" (by means of, inter alia, "licenses")—as well as to "prevent or prohibit"—property transactions. In view of this listing in Section 5(b), the argument that only actual prohibitions can qualify as an exercise of Section 5(b) authorities (for purposes of the grandfather clause) ignores the language of the relevant statutes.

b. The structure of IEEPA itself again casts a vivid light on whether Congress envisaged foreign assets control programs as on-going *systems* subject to flexible adjustment or, rather, as a laundry-list of specific prohibitions. For it is striking that, once a IEEPA embargo has been invoked and is underway, IEEPA procedures afford the President precisely the sort of flexibility that the court of appeals thought the President was contemporaneously being stripped of in connection with grandfathered TWEA programs. Under IEEPA, once the President has declared a national emergency with respect to a particular threat, that declaration serves as the predicate for an ongoing system of regulation, and

the Executive may issue and amend regulations with respect to that threat without declaring a new national emergency. Nothing in IEEPA would prevent the President from imposing, first, an embargo on trade in machinery, and then—without a new emergency declaration—prohibiting economic transactions incident to travel. Since Congress chose not to require a new declaration of emergency in the midst of a program operating pursuant to IEEPA, it is peculiar to ascribe to it the decision to impose such a requirement in connection with grandfathered TWEA programs.

In this connection it is significant that Congress in the grandfather clause expressly created a new procedure that serves, in effect, as a substitute for new declarations of national emergency. In place of such new declarations, Congress required the President to make an explicit annual determination that continued exercise of TWEA authorities with respect to a particular country is in the national interest. In view of this required annual review, it is unlikely that Congress would also have required the declaration of a new national emergency whenever an existing program was significantly modified.

The result of the court of appeals' conclusion (Pet. App. 12a)—that Congress intended to force a President wishing to make post-July 1, 1977, changes in assets control programs to use the new IEEPA procedures—is to create an unwieldy two-track system. Some regulations involving Cuba (those addressed to purchase of Cuban machinery, sugar, or cigars) would be administered under grandfathered TWEA authority (and would be generally frozen into their July 1977 shape). Others (those addressed to purchase of Cuban tourist travel and entertainment packages) would be administered under new IEEPA authority. Under such a two-track system, the President would determine annually that it is in the national interest to continue a portion of the assets control program (that conducted pursuant to grandfathered authority); and he would declare a new na-

tional emergency and thereafter adhere to the IEEPA reporting and consultation requirements in connection with the other elements of the same program. There is no indication in either the language or structure of Public Law 95-223 that Congress contemplated or would have wished to create such a patchwork system.

II. In Enacting The Grandfather Clause Congress Acted Against A Long Tradition Of According The President Regulatory Flexibility To Adjust Foreign Assets Control Programs To Meet Changing Foreign Policy And National Security Needs

A. A natural reading of the grandfather clause to mean that Congress did preserve the President's TWEA authority to modify the Cuban Assets Control Program would be harmonious with the longstanding traditions that constituted the background against which Congress acted. Flexibility of administration has for more than four decades been a central feature of such TWEA programs, allowing the President to change the scope and form of regulations in response to shifting foreign policy and national security needs. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 673 (1981); *Nielsen* v. *Secretary of the Treasury*, 424 F.2d 833, 839-841 (D.C. Cir. 1970). Ever since 1940—when Exec. Order No. 8389 (3 C.F.R. 645) "froze" the assets of Nazi-occupied Norway and Denmark —TWEA assets control programs have assumed a consistent structure. An initial Executive Order or basic Treasury Department regulation—Regulation 201 in the case of the Cuban Assets Control Program—imposes a general prohibition on all unlicensed transactions. That prohibition—which normally tracks the language of Section 5(b) and thereby subjects to centralized regulatory supervision all transactions within the scope of the statute—remains in effect throughout the life of the program. This is then followed by a series of licenses, which are used to make specific adjustments to the general prohibition and to ease or retighten specific areas of prohibition on a short-term or long-term basis, in response to changes

in the foreign policy and national security situation. See *Propper* v. *Clark*, 337 U.S. 472, 475, 479 (1949); *Zittman* v. *McGrath*, 341 U.S. 446, 448, 464 (1951); Malloy, *Embargo Programs of the United States Treasury Department*, 20 Colum. J. Transnat'l L. 485, 496-510 (1981). The Cuban Assets Control Program has itself followed this pattern and has undergone considerable change since its institution in 1963.[29]

Because the underlying comprehensive prohibition remains in place throughout the existence of an assets control program, the President may loosen and tighten various restrictions without in any way abrogating the underlying regulatory authority to prohibit all property transactions within the scope of Section 5(b). Such a reservation of authority is essential if foreign assets control programs are to function as effective policy tools; until full normalization of relations with the subject country, the President cannot be certain that a deteriora-

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[29] The history of the Cuban Assets Control Regulations is set out at Pet. 20-21 nn.32 & 33.

The traditional manner in which foreign assets control programs operated is also illustrated by the former TWEA program for the People's Republic of China. The basic prohibition on unlicensed property transactions was instituted in 1950. See 15 Fed. Reg. 9040. The scope of the program was changed from time to time over the next 20 years by use of the licensing mechanism. See *United States* v. *Broverman*, 180 F. Supp. 631, 637 (S.D.N.Y. 1959); Sommerfield, *Treasury Regulations Affecting Trade With the Sino-Soviet Bloc and Cuba*, 19 Bus. Law. 861, 863 (1964). In 1971, as part of the general effort to improve relations between the United States and the People's Republic, the program was relaxed to permit under a general license a wide variety of previously prohibited transactions, opening the way for renewal of trade and other business relationships. See 36 Fed. Reg. 8584. Nevertheless, the People's Republic remained a "designated country" subject to the broad prohibition on unlicensed transactions found in 31 C.F.R. 500.201. Finally, in connection with the general normalizing of relations with the People's Republic, and following a claims settlement agreement entered into in May 1979, Chinese assets were unfrozen and the assets control program was ended. 45 Fed. Reg. 7224 (1980). Only then did the Executive remove the basic prohibition on unlicensed transactions involving the People's Republic.

tion in relations or the need for a new foreign policy initiative will not require a modification in or revocation of previously issued licenses. Broad reservation of authority also preserves the Treasury's jurisdiction to enforce license terms, act against license violations, and generally monitor licensed activity.

This Court has long recognized that the success of foreign assets control programs requires broad Executive authority and administrative flexibility to adjust the program as the diplomatic and national security situation changes. Thus, in cases involving World War II TWEA programs—programs that regulated the right of persons subject to United States jurisdiction to engage in a broad range of property transactions (in part by freezing and vesting of assets)—this Court, in upholding the Executive's actions, interpreted the statute as indicating a "congressional purpose to put control of foreign assets in the hands of the President * * *, so that there might be a unified national policy in the administration of the Act." *Propper* v. *Clark*, 337 U.S. at 493. See also *Dames & Moore* v. *Regan*, 453 U.S. at 673; *Zittman* v. *McGrath*, 341 U.S. at 448, 463-464; *Lyon* v. *Singer*, 339 U.S. 841 (1950). It is in view of that broad purpose that the Court has always construed TWEA authority as providing the Executive with great flexibility. See *Orvis* v. *Brownell*, 345 U.S. at 187-188; *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319 (1952); *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-489 (1947); see also *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106, 110 (2d Cir.), cert. denied, 385 U.S. 898 (1966). As the Court noted in *Dames & Moore* v. *Regan*, 453 U.S. at 672, the legislative history of the TWEA and the cases interpreting it "fully sustain the broad authority of the Executive when acting under this congressional grant of power." [30]

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[30] The Iranian assets control program, which operates under the authority of IEEPA, illustrates the sorts of adjustments that may be necessary under such a program. In the early stages of the

As we show in Section III, the legislative history indicates that Congress was well aware of the flexible manner in which foreign assets control programs are administered. But even if there were no such direct evidence, it is implausible to assume that Congress acted in ignorance of this consistent and long-maintained tradition of flexibility and regulatory adjustment (see *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978)) and for the first time took steps to prevent the Executive from meeting changing policy needs through adjustments to such a program. See *Haig* v. *Agee*, 453 U.S. 280, 297-298 (1981); *Lorillard* v. *Pons*, 434 U.S. at 580-581; *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951).[31]

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program, soon after seizure of the hostages at the United States embassy, the President used his emergency economic powers to block Iranian assets. Thereafter, the program was modified so that parties with claims against Iranian entities were permitted under a general license to apply for court-ordered attachments of Iranian property. Then, in connection with the signing of the agreements that led to the freeing of the hostages, the President revoked the general license, with the result that the court-ordered attachments that had been obtained pursuant to that license were rendered invalid. See *Dames & Moore* v. *Regan*, *supra*.

[31] It will not do to suggest that the grandfather clause permits relaxation of restrictions on transactions, but does not allow tightening of an embargo without the declaration of a new national emergency. The broad TWEA authorities that are preserved under the grandfather clause should not operate on a one-way ratchet. If Congress intended to give the President the flexibility to relax the embargo when United States foreign policy calls for such relaxation, it must also have intended that he be able to impose restrictions if he determines that such a step would further foreign policy interests.

Even if Congress had anticipated only relaxation of the Cuban embargo, it presumably would not have excluded the ability to tighten the embargo from the scope of grandfathered authority. In generally relaxing an embargo, the President might wish to tighten some regulations while he relaxed others, in order to maintain what he viewed as the proper mix of foreign policy measures. It would be anomalous to require declaration of a national emergency in connection with such an adjustment.

B. Construction of the grandfather clause to preserve the Executive's traditional flexibility in the administration of ongoing foreign assets control programs is particularly appropriate because of the significance of those programs for the foreign policy and national security interests of the United States. As this Court has recognized, the President needs maximum flexibility in the areas of foreign policy and national security; it is therefore traditional for Congress to delegate broad authority in those areas. See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *Dames & Moore* v. *Regan*, 453 U.S. at 678-679; *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 324 (1936); *Mackenzie* v. *Hare*, 239 U.S. 299, 311 (1915). See also *E.W. Bliss Co.* v. *United States*, 248 U.S. 37, 46 (1918); *Curran* v. *Laird*, 420 F.2d 122, 128 (D.C. Cir. 1969).

The regulation at issue here presents a perfect illustration of the manner in which steps taken under an assets control program can serve the changing needs of United States foreign policy. Following the 1977 liberalization with respect to travel-related property transactions, there was a deterioration in relations between the United States and Cuba. Beginning in 1978, Cuba increased its military involvement in various countries in an effort to destabilize governments friendly to the United States. See J.A. 109, 113-114. In late 1981 the United States learned that Cuba was engaged in plans significantly to expand its tourist industry.[32] The 1982 retightening of restrictions on travel-related transactions constituted a response to these developments and served a dual foreign policy purpose. It operated as a means—short of force—of expressing the United States' serious disapproval of

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[32] See Enders Declaration ¶¶ 8-9 (J.A. 173-175); Michel Declaration ¶ 6 (J.A. 180). See Pet. 8-9 n.15 for a description of actions Cuba was taking to build its tourist industry in this period.

Cuba's adventuristic policies;[33] in addition, it "reduce[d] Cuba's hard currency earnings from travel by U.S. persons to and within Cuba" (47 Fed. Reg. 17030 (1982)), thus decreasing the ability of the Cuban Government to generate resources to finance policies detrimental to United States interests.[34]

The court of appeals' opinion reflects little awareness of the administrative flexibility that has been a consistent hallmark of TWEA assets control programs. And its reading of the grandfather clause as not authorizing modification of grandfathered programs seriously undermines the efficacy of those programs as instruments of foreign policy.[35]

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[33] Michel Declaration ¶¶ 3-8 (J.A. 178-181); Frechette Declaration ¶ 5 (J.A. 107).

[34] Reestablishment of a vigorous tourism industry could provide Cuba with a significant source of hard currency to further its foreign policy goals. In 1958, Cuba earned $37 million from United States travelers alone—two percent of its gross national product and almost four percent of foreign exchange earnings (Enders Declaration ¶ 10, J.A. 175). United States government estimates indicated that if Cuba could return tourism to its 1958 prominence as a source of foreign exchange, within a few years it would earn a net hard currency income of approximately $190 to $225 million per year, which would amount to 20% of Cuba's annual hard currency income under present conditions (June 3, 1983, Walker Declaration ¶ 4, J.A. 159).

[35] The 1982 regulation continues to permit economic transactions in connection with certain types of travel the United States wishes to encourage on First Amendment and humanitarian grounds. For example, the regulation retains a general license authorizing travel-related property transactions by members of the press and by individuals with close family members in Cuba. By permitting these transactions, the United States provides incentives to the Cuban Government to conduct its affairs in an internationally acceptable manner. See Michel Declaration ¶ 6 (J.A. 180).

In their brief in opposition (at 36) respondents attribute significance to the fact that the Cuban Assets Control Regulations permit trade between Cuba and foreign-based subsidiaries of United States corporations (see 31 C.F.R. 515.559) and that such trade results in economic benefit to Cuba. But different sorts of foreign policy con-

The court of appeals suggested that it was not interfering with the ability of the Executive to take "whatever steps [are] necessary to conduct our affairs with Cuba" (Pet. App. 12a) because the President may use IEEPA procedures to institute such measures. But the suggestion is far too casual. Action under IEEPA requires the President to declare a new national emergency based on a finding that Cuba presents an "unusual and extraordinary threat" to the "national security, foreign policy, or economy" of the United States. 50 U.S.C. 1701. That is a step with obvious and momentous foreign policy implications. See Michel Declaration ¶ 9 (J.A. 181-182). The declaration of a national emergency and the finding of an "unusual and extraordinary threat" may be warranted in order to institute a new assets control program. But it is a wholly different question whether the President should take such a step—one that could significantly heighten tensions—in order to make an adjustment to or a modification in an existing program. To *require* that such a step be taken whenever the President wishes to tighten in any respect the embargoes as they stood with respect to Cuba, North Korea, Vietnam and Cambodia on July 1, 1977, is to introduce a dangerous and unnecessary rigidity into the conduct of our foreign policy.

C. The Treasury Department has consistently interpreted the grandfather clause as authorizing modification of assets control programs in existence on July 1, 1977,

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siderations underlie that aspect of the regulations. In a number of cases, host countries insist that subsidiaries of United States companies are nationals of the host country and must be permitted to trade with Cuba if the host country permits such trade. Therefore, the Treasury Department regulations authorize such trade (under strict conditions) in order to avoid foreign relations difficulties with those countries. Affidavit of Dennis M. O'Connell, Director, Office of Foreign Assets Control ¶¶ 13-14 (J.A. 125-126). In any event, since the result of trade between Cuba and foreign-based subsidiaries of United States companies is a net outflow of hard currency from Cuba, respondents' point is a hollow one. See O'Connell Affidavit ¶ 15 (J.A. 126).

thereby preserving the flexibility necessary to the continuing effectiveness of those programs. Accordingly, the Department has continued to modify grandfathered programs.[36] That construction of the statute by the agency charged with its administration is entitled to deference. See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31-32 (1981); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[37]

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[36] Post-1977 modifications to the Cuban Assets Control Regulations are described at Pet. 20-21 n.33. In *United States* v. *Frade*, 709 F.2d 1387, 1397-1403 (1983), the Eleventh Circuit concluded that one of these post-1977 modifications—31 C.F.R. 515.415, the Mariel boatlift regulation—was not authorized by the grandfather clause, citing the decision of the court of appeals in this case. The court in *Frade* did not have the benefit of full briefing or argument on the grandfather clause issue, since the decision of the court of appeals in this case was issued after oral argument in *Frade*.

The United States did not seek certiorari in *Frade*, because the court of appeals rested its reversal of the convictions in that case on two independent grounds: (i) insufficient evidence to show what the court viewed as the requisite level of specific intent, as well as (ii) the invalidity of the boatlift regulation. The Solicitor General determined that the holding with respect to evidence of specific intent was not sufficiently important to warrant seeking review by this Court.

[37] Deference to agency interpretation is particularly appropriate in a case like this one, in which representatives of the Executive Branch were intimately involved in the drafting of the statute. As we explain in Section III, representatives of several federal agencies attended the mark-up sessions and worked closely with the subcommittee staff in the drafting of the legislation, including the development and revision of the grandfather clause. In these circumstances, the Treasury Department, which took the lead in representing the Administration viewpoint before the subcommittee, is in a particularly good position to know what Congress intended when it enacted the grandfather clause.

III. The Legislative History Of The Grandfather Clause Shows That Congress Intended To Preserve The President's Authority Under TWEA To Regulate Travel-Related Economic Transactions Involving Cuba

The legislative history of Public Law 95-223 shows that it was one of the overarching purposes of the statute to preserve the President's authority to conduct the Cuban Assets Control Program under TWEA Section 5(b) without the invocation of a new national emergency. That history further indicates that Congress understood that what was involved was an embargo *program* subject to adjustments, not a subject-specific list of particular prohibitions to be frozen into place as of July 1, 1977. Finally, nothing in the legislative history supports the conclusion that Congress contemplated that the authority to regulate travel-related economic transactions falls outside the scope of the Cuban embargo program and comprises a separate and distinct category of authority.

We note at the outset that the legislative history is complicated, variegated, and, on occasion, obscure and contradictory. Public Law 95-223 was the product of four years of legislative attention to the controversial issue of presidential "emergency" powers. Resolution of countervailing interests and policies was achieved in large part through negotiations among Congress, congressional staff, and the Executive Branch. Points of resolution between competing policy thrusts emerged at various times, only to be reformulated later in the process. Much of the legislative history consists of subcommittee sessions characterized by numerous informal exchanges among subcommittee members, subcommittee staff and Executive Branch witnesses. Throughout, different people used different, sometimes imprecise, words ("authorities", "powers", "actions", etc.) to refer to subtle concepts. In such a setting it is particularly dangerous to take out of context individual exchanges or formulations that were part of the ongoing process of negotiation and drafting. Instead, the legislative history must be understood in terms of its dominant movement and fundamental purposes.

A. Public Law 95-223 grew out of a congressional review of presidential use of emergency powers commenced in 1973. See S. Rep. 94-1168, 94th Cong., 2d Sess. 8-9 (1976); H.R. Rep. 95-459, 95th Cong., 1st Sess. 6-7 (1977). In initiating that review Senator Church pointed out that the United States had been in a state of emergency continuously since President Roosevelt declared the banking emergency of 1933. *National Emergency: Hearings Before the Senate Special Comm. on the Termination of the National Emergency, Part I*, 93d Cong., 1st Sess. 2 (1973). The Special Committee established to conduct the inquiry discovered that no fewer than four national emergency proclamations were then extant. The most significant of these was President Truman's 1950 Korean war emergency proclamation, which served as the basis for the embargoes against North Korea, Cuba, Vietnam, and Cambodia. S. Rep. 94-1168, *supra*, at 9. The Committee eventually identified over 450 statutes giving the President various emergency powers. S. Rep. 93-549, 93d Cong., 1st Sess. 7 (1973).

Congress was understandably concerned that the currency had become cheapened in the area of emergency powers and that the superannuated states of emergency that remained in effect gave the President too much discretion in the use of such powers. As a partial solution to this problem, Congress enacted the National Emergencies Act of 1976, 50 U.S.C. 1601 *et seq.* (see page 5 *supra*). The Executive Branch supported this legislation. But it was also greatly concerned about the effect of the legislation on then-existing uses of the President's TWEA powers—uses that were in no way superannuated. There were strong recommendations from representatives of the Treasury and State Departments that the new legislation should not disturb the then-existing freeze on Chinese assets and the embargoes against Cuba, Vietnam, Cambodia and North Korea. *National Emergencies Act: Hearings on H.R. 3884 Before the Sub-*

comm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 38, 41, 45, 47, 81-82 (1975). In response to this concern, Congress exempted Section 5(b) of the TWEA from the 1976 National Emergencies Act, see 50 U.S.C. 1651(a)(1), providing instead for further study of appropriate revisions to Section 5(b). 50 U.S.C. 1651(b); see H.R. Rep. 95-459, 95th Cong., 1st Sess. 6-7 (1977); page 5, *supra*.

During the spring of 1977, the responsible subcommittee of the House Committee on International Relations held hearings and mark-up sessions to consider the legislation necessary to reform Section 5(b). *Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. (1977) (hereinafter cited as *Hearings*). The objective was to resolve the problem left open by the National Emergencies Act—what (if any) changes should be made in the President's authority under Section 5(b) to exercise emergency economic powers? The subcommittee's solution to this problem reflected two dominant purposes. Congress wanted to limit the President's authority to exercise peacetime emergency economic powers by giving Congress a greater voice in the exercise of these powers. The proposed legislation therefore limited the use of TWEA Section 5(b) authorities to times of war, and (in IEEPA) spelled out new predicates and procedures for the use of economic powers in connection with future national emergencies in times of peace.

At the same time—and equally important—the subcommittee designed the legislation to make sure there would not be interruption of or interference with the President's powers to continue existing embargo programs that were then being conducted on the basis of past declarations of emergency. (Indeed, Chairman Bingham acknowledged that the Administration's consent could never be obtained if Congress attempted to end the existing

programs: "This is essentially an act trying to clear up the mess that the [TWEA] has left us in. We can always move on the front of Vietnam or Cuba * * * However, to get this through in reasonably good form, we would like not to raise that particular controversy." *Hearings* 210.) Congress recognized that the use of IEEPA procedures—in particular, the need to declare a *new* national emergency based on a *new* finding of an "unusual and extraordinary threat" to the security or foreign policy or economy of the United States—might be inappropriate and awkward in the context of ongoing embargo programs covering countries such as Cuba and Vietnam, and might embarrass and complicate our difficult and sensitive relations with these countries.

The accommodation of these two dominant purposes provides the overarching point-counterpoint of the legislative history. IEEPA procedures were to apply to *future* crises and *future* emergencies; they were not to apply to ongoing programs already initiated under previously declared emergencies. The House Report states: "The purpose of the legislation is to redefine the power of the President to regulate international economic transactions in *future* times of war or national emergency." H.R. Rep. 95-459, *supra*, at 1 (emphasis added). See also *id.* at 13 ("Title II of the bill confers upon the President authority to exercise controls on international economic transactions during future national emergencies"); 123 Cong. Rec. 22475 (1977) (IEEPA "confers upon the President a new set of authorities for use in time of future national emergency") (statement of Representative Bingham).[38] At the same time, the grand-

[38] See also 13 Weekly Comp. Pres. Doc. 1940, 1941 (Dec. 28, 1977) (statement of President Carter that the new legislation "places additional constraints on use of the President's emergency economic powers in future national emergencies").

There are in the legislative history some references to use of IEEPA procedures for any "future action." But it seems clear when the context is considered that such references were not meant to apply to adjustments to the controls imposed with respect to

father clause was incorporated in the legislation to assure that ongoing assets control programs could continue without the need to declare a new national emergency.

B. The concern that new and awkward constraints should not be applied to existing assets control programs—particularly the Cuban program—was raised at an early stage of the legislative process. Professor Andreas Lowenfeld was the first witness at the hearings on Public Law 95-223. He pointed out that it would be an "awkward act * * * perhaps even an inappropriate interference in negotiations being carried out by the executive branch" if the Cuban embargo program were suddenly ended by a repeal of Section 5(b). *Hearings* 10. Professor Lowenfeld went on to point out the difficulties that would result from requiring a new declaration of national emergency in the midst of a program: "Coming again to the Cuban situation, * * * I could imagine that the President might well not be anxious at a given point to proclaim anew a state of emergency even as he was negotiating for relaxation of tensions." *Ibid.*

Administration witnesses also stressed that the President should not be required to declare a new emergency with respect to Cuba. Leonard Santos of the Department of the Treasury explained the reluctance of the Executive

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countries like Cuba and Vietnam. For example, when the House subcommittee staff director asked for the Administration's understanding of the extent to which IEEPA procedures would be used in connection with a new emergency problem, Leonard Santos of the Treasury Department responded by distinguishing between such "future actions" and any new measures concerning Cuba or Vietnam:

> My understanding is that if section 5(b), or the International Economic Emergencies Act is used as a basis for future action, it would have to conform to the procedural restraints of that act.
>
> If the President claims that he must do something new with respect to Cuba, or new with respect to Vietnam, that, of course, is automatic.

Hearings 211.

to consider declaring a new national emergency in connection with existing programs: "But if a new national emergency had to be declared [with respect to existing uses of Section 5(b)] under all the constraints that have been placed in this staff draft, I am not certain that a new national emergency would be declared." *Hearings* 182. Santos went on to note that "it is difficult, considering our present state of negotiations with Cuba and other countries that the President would want to declare a national emergency with respect to those countries." *Id.* at 190. See also *id.* at 191, 193-194.

Those who were drafting the new legislation were sympathetic to the Executive's concerns. Chairman Bingham said: "I can see the problem. I personally would not argue that we should ask or expect the President to declare, for the first time, an emergency with respect to Cuba." *Hearings* 190. The subcommittee thus proceeded to draft a new version of the grandfather clause, one that Mr. Bingham characterized as a "reasonably satisfactory" response to the Administration's objections. *Id.* at 209. He noted (*id.* at 207) that the subcommittee had decided that there should be grandfathering of "those situations where [TWEA] authorities are currently being exercised under the old Trading With the Enemy Act—and I might mention that the principal ones are Vietnam, Cuba, and North Korea, and the freezing of assets of a number of Communist countries * * *," and that "[w]e have recognized that it might be embarrassing for the President to have to declare new national emergencies with respect to Cuba and Vietnam." The subcommittee staff director, R. Roger Majak, stated: "The prospect of the president having to declare a new emergency with respect to some of these existing uses, such as Cuba, * * * does pose a diplomatic, or potential diplomatic problem." *Id.* at 209.

The one point that stands out clearly from these comments is that Congress was persuaded not to require the President to declare a new national emergency in order

to continue the existing embargo program with respect to Cuba.

C. The further question that remains is whether the existing embargo with respect to Cuba was perceived as a specific list of specific prohibitions, or, rather, as a program or system of restrictions subject to periodic adjustment. The court of appeals supported its conclusion that only restrictions actually on the books on July 1, 1977, were grandfathered by pointing out that there were references in the legislative history to grandfathering "existing uses" of TWEA authorities (see Pet. App. 7a-9a).[39] But, for every invocation of the word "uses," we can cite a countervailing example where the reference was to grandfathering an existing "embargo" or "program." For example, during the hearings Representative Bingham stressed that it was not the intention of the subcommittee to interfere with the continuation of "the current embargo against North Korea, Vietnam, and Cuba" and that "it is the intention of this subcommittee, the consensus so far, that we want to grandfather in and not disturb the embargoes against Cuba, against North Vietnam, and against North Korea." *Hearings* 188, 193. The House report described the uses of Section 5(b) authorities that were to be grandfathered as including "the total U.S. trade embargoes of Cuba and Vietnam." H.R. Rep. 95-459, *supra*, at 9-10. During consideration by the full House, Representative Bingham described the grandfather clause as allowing the continuation in effect, at the President's discretion, of "trade embargoes and asset control programs currently applied by the United States under the authority of sec-

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[39] As previously pointed out (see pages 18-30, *supra*), it is our position that the authority to regulate travel-related economic transactions *was* being "used" (exercised) on July 1, 1977, through the comprehensive prohibition asserted by Regulation 201(b) combined with the revocable 1977 general license. The word "uses" seems simply a shorthand for the term "authorities * * * being exercised." *What* authorities were being exercised is not in any way indicated or specified by the word "uses."

tion 5(b)." 123 Cong. Rec. 22475 (1977). Later he stated that "this legislation specifically grandfathers the embargoes against Vietnam, Cambodia, Laos, Cuba, and other existing embargoes, so that *they are not affected in any way by this legislation.*" 123 Cong. Rec. 38166 (1977) (emphasis added). The Senate report states: "Section 101(b) would enable the President to continue to control transactions with certain countries (Cuba and Vietnam, for example) * * *." S. Rep. 95-466, 95th Cong., 1st Sess. 4 (1977). On signing the legislation, President Carter stated that it would not affect "embargoes now being exercised against certain countries." 13 Weekly Comp. Pres. Doc. 1940, 1941 (Dec. 28, 1977).[40]

There is no indication in the legislative history that Congress believed that the "embargoes" and "programs" to which it was referring amounted to static sets of regulations. In fact, Congress was aware that embargoes are adjusted over time to meet changing foreign policy needs. Julius Katz, Assistant Secretary of State, advised the House subcommittee that the Section 5(b) controls "currently being exercised are reviewed on a continuing basis in the context of our developing relationships with the targeted countries" and that our relations with Cuba were "still unsettled." *Hearings* 98, 117.[41]

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[40] References in the legislative history to "embargoes" or "trade embargoes" appear to be shorthand for programs of assets controls. Contrary to respondents' suggestion (Br. in Opp. 22-23), there is no indication in the legislative history that references to an "embargo" were intended to encompass only restrictions on trade in commodities such as Cuban sugar, as opposed to the full range of existing controls on all types of property transactions specified in Section 5(b)(1)(B). In fact, some of the references were to "trade and financial embargoes." See *Hearings* 103 (statement of Assistant Secretary Bergsten).

[41] See also *Hearings* 147 (remarks of subcommittee staff director Majak) (referring to the need for grandfathering to avoid interference with "ongoing uses of [Section 5(b)]"); *id.* at 197-198 (remarks of Leonard Santos).

It is also striking that there is virtually no reference in the legislative history to the subject-matter content of the regulations on the books as of July 1, 1977—as there presumably would have been if Congress's intent was simply to grandfather specific prohibitions.[42] Rather, whenever *categories* of 5(b) authorities were being discussed, the reference was to the broad classes of regulation specified by Section 5(b) itself. Thus, Mr. Majak stated:

> The current uses which the staff draft grandfathers on page 4, paragraph (e), are the uses of 5(b) *transaction controls* to implement our current trade embargoes against Vietnam, Cuba, North Korea, and to *control foreign assets* in certain places like the People's Republic of China, Czechoslovakia, and others, with which we have not settled certain financial claims.
>
> The staff draft would make no change in the status of those claims, or any of the authorities currently exercised under 5(b). It would permit them to continue to be used as long as the President determines it is necessary to do so.

Hearings 147-148 (emphasis added). See also *id.* at 167 ("assets" controls vs. "currency" controls); and see *id.* at 100, 107-108, 144-145, 147, 152, 207, 215.

Even more striking, there is not the slightest indication that Congress had any intention of singling out travel-related economic transactions as a special and distinct subject, to be regulated under new IEEPA procedures as opposed to grandfathered TWEA procedures. Indeed, the only mentions of travel-related economic

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[42] To the extent Members of Congress focused on the content of the regulations, they were referred to a 1976 version of the Cuban Assets Control Regulations. See *Hearings* 168; Staff of the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess., *Trading With the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency* 640 (Comm. Print 1976).

transactions indicate that Congress was apprised that such transactions *were* subject to regulation under TWEA Section 5(b) authorities. For instance, when Mr. Majak, the subcommittee staff director, noted that "there are other authorities being exercised with respect to Cuba and Vietnam," Representative Findley asked Mr. Santos: "Would you list those?" Mr. Santos replied:

> They are essentially transaction control regulations to the extent that the transaction involves a transfer of assets, it would involve the travel to those countries and the exchange of goods. Those are powers being exercised under 5(b), and this is considerably more extensive than the freezing of a bank account or a piece of property.

Hearings 215.[43]

D. In support of its view that Congress intended to grandfather only restrictions that were actually on the books as of July 1, 1977, the court of appeals relied heavily on the fact that the subcommittee deleted from an early version of the grandfather clause language stating that "any other authority conferred upon the President by [Section 5(b)] may be exercised to deal with the same set of circumstances," and Representative Bingham's statements about that deletion. See Pet. App. 9a-10a. We reprint in the margin the entire exchange referred to by the court of appeals.[44] Representative Bing-

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[43] In addition, Mr. Majak mentioned that the news media "in the case of Cuba objected to the fact that they are subjected to a licensing process in order to travel to certain embargoed countries" and that "[t]hat was certainly a part of the exercise of the authorities" (*Hearings* 197).

[44] MR. BINGHAM. I have a question, and perhaps we could spend a few minutes on this before we go on. I do have a question as to whether subparagraph (2) on page 2 is desirable. Would you explain that, and indicate the reason for that?

MR. MAJAK. Our reading of that would be that with respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those particular au-

ham's remarks, even on their face, show at most that at this stage of the hearings he was concerned that the exercise of one broad category of Section 5(b) authority ("assets controls") not be usable as a predicate for the exercise of a different broad category of 5(b) authority ("currency controls"). Thus, the deletion cannot be taken to indicate that Congress intended to freeze into place specific subcategories of assets prohibitions on the books on July 1, 1977.

Even more important, at the hearings on the following day Mr. Santos of the Treasury Department, responding to the invitation to provide the "administration's reaction," testified that the issue was in effect moot because the President was in fact exercising all of the authorities provided by Section 5(b):

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thorities that he is now using, but any others which are conferred by section 5(b).

So, if the President is presently using asset controls toward a particular country, but is not using, let us say, currency controls, he nonetheless could use, at some later date if he so desired, currency controls with respect to that situation.

MR. BINGHAM. I have a serious question about that. It seems to me that if the President has not up to now used some authority that he has under section 5(b) in connection with those cases where 5(b) has been applied, I don't know why it should be necessary to give him authority to expand what has already been done. It is really going beyond grandfathering.

It seems to me that grandfathering applies to what has been done to date, and that should be ample authority. I think on this point we would be particularly anxious to have the administration's reaction.

MR. MAJAK. If I may perhaps state it another way, I think it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the particular authorities themselves and their usage.

MR. BINGHAM. In those situations?

MR. MAJAK. Yes.

Hearings 167.

> Mr. Cavanaugh, I believe, asked whether or not there were powers—you also asked if there were not powers now not exercised under 5(b), that we might wish to exercise pursuant to existing circumstances, existing embargoes.
>
> We have reviewed the powers conferred under this draft. Frankly we believe that all the powers conferred are exercised and that there are no additional powers that could be exercised that are not already exercised.

Hearings 188. Congressman Bingham understood this point, commenting immediately thereafter:

> You have said, as I understand it, that there is no need for subparagraph 2, that you would not be disturbed by the elimination of paragraph 2.

Ibid. And Mr. Bingham emphasized that "we are aiming at the same objectives" (*id.* at 189). In other words, on reflection, all parties agreed that the language at issue was surplusage and thus unnecessary.

At the very next meeting of the subcommittee, Mr. Bingham summarized the subcommittee's accommodation of the Administration's views as follows:

> For the benefit of some of the members who have not been able to be present at the previous sessions of the subcommittee on this bill, let me attempt to summarize the working draft that we have been working on.
>
> SUMMARY OF STAFF DRAFT
>
> First of all, title 1 limits the existing Trading with the Enemy Act to situations where there is a declared war, that is for the future. With regard to those situations where these authorities are currently being exercised under the old Trading With the Enemy Act—and I might mention that the principal ones are Vietnam, Cuba, and North Korea, and the freezing of assets of a number of Communist countries, including China as well as a number of Eastern European countries—the tentative judgment

of the subcommittee has been that these, in effect, should be grandfathered, subject only to a requirement that as of September of next year, which is the time at which the other emergencies that are covered by the National Emergencies Act expire, the President would simply have to indicate that certain powers which he has been exercising under the Trading with the Enemy Act are to be continued in the national interest. This is the latest of several versions that we have discussed.

We have recognized that it might be embarrassing for the President to have to declare new national emergencies with respect to Cuba and Vietnam. At the same time, if we were to take action here, in effect, terminating those embargoes, we know that this bill, which we hope will not be particularly controversial, would become instantly controversial.

So we have arrived at this proposed compromise, which I hope will be satisfactory to the administration. We would not require the President to declare that the emergency of 1950, under which those powers are now being exercised, continues; we would simply require him to state, beginning in September 1978 and annually thereafter, that such powers are continued in the national interest.

Hearings 207-208.

The history of these exchanges thus illustrates, again, the dangers of quoting out of context narrow passages from the legislative history. Nothing in the deletion of the subparagraph (2) language, we submit, supports the proposition that Congress intended to freeze into place the specific list of goods and services that happened to be the subjects of a prohibition on July 1, 1977.[45]

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[45] There are, of course, some indications in the legislative history that Congress did not wish the grandfather clause to be read in an overly expansive manner. In particular, Representative Cavanaugh —an *opponent* of grandfathering—sought, and obtained, confirmation of the Administration's understanding that the grandfather clause would "preclude the expansion by the President of the au-

As we noted at the outset of this section, the legislative history reflects both Congress's wish to limit the President's use of emergency economic powers and its desire to preserve authority in connection with existing Section 5(b) programs. In the course of many days of hearings, some remarks were made that could be read to support the court of appeals' reading of the grandfather clause.[46] Occasionally the discussions during the

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thorities that might be included in 5(b) but are not being employed as of June 1, 1977." Staff of House Comm. on International Relations, 95th Cong., 1st Sess., *Markup on Revision of Trading With the Enemy Act* 21 (Comm. Print 1977). But the quoted language is quite consistent with the concern, simply, that the President might use the grandfather clause to extend the exercise of Section 5(b) powers to new countries. During the House subcommittee hearings several subcommittee members had suggested that the grandfather clause might be read to permit such an extension to different countries. See, *e.g.*, *Hearings* 211 (remarks of Rep. Ireland) ("Let us say Cuba is grandfathered in under that * * * could that grandfathered authority be broadened out from—Cubans have troops in Angola"); *id.* at 211-212 (remarks of Rep. Findley) ("would those grandfathered ones then be spread out to cover just a tremendous wide spectrum? The Vietnam one could end up covering all of Southeast Asia"). In light of these suggestions, Representative Cavanaugh may have only been seeking a commitment from the Administration not to extend the grandfathered authority to countries not previously covered by Section 5(b) controls.

Even if Representative Cavanaugh was speaking more narrowly, there is no indication that he wished to make distinctions within subcategories of property transactions, rather than between broad categories of Section 5(b) authorities as these are specified in Section 5(b) itself. As already shown, to the extent there is any discussion in the legislative history of distinction among authorities, the categories mentioned were broad.

[46] For example, at one point during the House subcommittee hearings, Representative Bingham stated that the subcommittee had "no intention of grandfathering additional acts that may be taken in the next few weeks." *Hearings* 211. It is unclear whether Representative Bingham was referring to acts with respect to a country not then covered by an assets control program or to any new acts. In any event, his statement must be evaluated in the context of his other comments, in which he indicated that the Cuban

hearings reflect more confusion than any affirmative indication of legislative intent;[47] and, as we have noted, the terms used were sometimes imprecise. But the dominant thrust of the legislative history demonstrates Congress's desire to accommodate the Executive's concern that authority in connection with ongoing assets control *programs*—particularly the Cuban program—be preserved to avoid placing the President in the position of having to declare a new national emergency with respect to Cuba; and to prescribe IEEPA procedures for use only in the case of future emergencies.

IV. The Regulation At Issue Is Not Excluded From Grandfathered TWEA Authority On The Ground That It Has An Incidental Effect On Travel

A. The court of appeals concluded (Pet. App. 11a-12a) that its construction of the grandfather clause was supported by this Court's opinion in *Kent* v. *Dulles*, 357 U.S. 116 (1958), in which the Court said (*id.* at 129) that the courts should "construe narrowly all delegated powers that curtail or dilute" the right to travel.

Kent involved a total prohibition on Kent's right to leave the country, based on his alleged pro-Communist activities. The prohibition was exercised by virtue of a highly general statutory authority delegating to the Secretary of State the power to "grant and issue passports." The Court concluded that the right to travel is a Fifth Amendment liberty that must be regulated, if at all, pursuant to the lawmaking power of Congress itself; that if the power to regulate is delegated, it must be under adequate standards; and that Congress had not spoken with a clarity adequate to justify the proscription against Kent.

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embargo program would be preserved and that the President would not be required to declare a new national emergency with respect to Cuba.

[47] See, *e.g.*, the inconclusive colloquy between Representative Bingham and Leonard Santos of the Treasury Department at *Hearings* 211-212.

In our view, the principle of statutory construction invoked in *Kent* v. *Dulles* has no application to this case.

1. *Kent*—like *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), also cited by the court of appeals—involved a direct and purposeful prohibition on the right to travel. Neither the TWEA, nor the grandfather clause, nor the regulation at issue in this case, regulates travel as such. They are addressed entirely to economic transactions involving the transfer of money or other economic benefits to Cuba. Their purpose is not to restrict the freedom of American citizens but to deny hard currency to a country that for two decades has specialized in the enterprise of opposing and subverting the foreign policy and security interests of the United States and its allies. This Court has never held—and, we submit, should not today hold—that the "narrow construction" rule of *Kent* should apply indiscriminately to all economic regulation that has the incidental effect of making it harder for a person to go to a particular country. Indeed, we believe that this Court's opinion in *Haig* v. *Agee*, 453 U.S. 280, 304-306, 309 (1981), forecloses application of the *Kent* analysis to the type of regulation at issue here. And see *Califano* v. *Aznavorian*, 439 U.S. 170, 177 (1978).

Applying the *Kent* rule of strict construction would be particularly inapposite when the regulation at issue constitutes one component of an elaborate regulatory mosaic. Neither Section 5(b), nor the grandfather clause, nor Regulation 201(b) mentions or distinguishes travel-related transactions. Each deals with a *system* of economic controls to be invoked against those countries—and only those countries—with which our relations are such as to warrant the imposition of a peacetime program of extensive economic sanctions. To superimpose a special rule of statutory construction onto one small part of such a regulatory system just because that part has an impact on some people's travel plans would unduly constrain Congress's power to deal systematically and comprehensively with our economic relations with those

countries for which commercial and financial relations are embargoed.

2. *Kent* v. *Dulles* is irrelevant to this case for another reason. The issue in *Kent* was whether Congress did or did not intend to prohibit Kent's travel. The Court held that, in the absence of a clear statement, it would assume that Congress did not. Here, the court of appeals conceded that Congress did delegate to the President the power to prohibit travel-related economic transactions. All it held was that, as of 1977, any such restriction must be imposed under IEEPA rather than under the TWEA. But we think that *Kent*'s constitutionally based clear-statement rule of construction is not an appropriate tool for determining whether the President should regulate by using one statutory procedure or another—particularly where the two statutes are equally silent about the authority so to regulate. On the court of appeals' own reasoning, all that Congress was deciding in 1977 was whether the pre-existing power to regulate economic transactions incident to travel should be shifted from one statutory "track" to another. The solution to that question is not aided or affected by the fact that such regulation has an incidental impact on the constitutional liberty to travel.[48]

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[48] The court of appeals (Pet. App. 12a) followed its reliance on *Kent* with a citation to Justice Jackson's opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952). And in their brief in opposition (at 20, 34), respondents chide us for failing to cite the portion of *Youngstown* in which Justice Jackson explained that the highest level of scrutiny is appropriate in cases in which the President takes measures incompatible with the express or implied will of Congress. In our view, *Youngstown* is simply irrelevant to this case. In *Youngstown* the government argued that the Executive has the "inherent" power to act, and to do so in disregard of concededly applicable statutory alternatives. In this case the government is making no claim that the Executive has "inherent" power to disregard IEEPA procedures and impose nonstatutory restrictions on travel-related property transactions with Cuba. It claims only that its regulations were issued in *compliance* with the procedures required by the relevant and applicable statute: the TWEA as grandfathered by Public Law 95-223.

3. Seven years after *Kent* this Court decided *Zemel* v. *Rusk*, 381 U.S. 1 (1965). In *Zemel* the Executive used the same general passport authority involved in *Kent*; but the prohibition encompassed only travel to Cuba. The Court held that the very same delegation of authority that was insufficient to justify a general ban on travel was sufficient to support a specific ban on travel to a particular country. In effect the holding was that *Kent*'s rule of "clear statement" did not apply—at least in full force—to *area* restrictions, which had a lesser impact on the liberty to travel, a stronger basis in administrative practice, and a more specific justification in foreign policy needs. See also *Haig* v. *Agee*, 453 U.S. at 305-306, 307-309.

Zemel v. *Rusk* shows that it was error for the court of appeals to subject the Cuban Assets Control Regulations to the scrutiny suggested by *Kent* v. *Dulles*. The rule that the courts should "construe narrowly" delegated powers that curtail the right to travel was created in the context of regulations that in effect told an American citizen that he must stay home. This Court has rejected the application of that very rule to delegated powers that merely told American citizens that they may not visit one particular country. *A fortiori*, the rule should not be applied to delegated powers that have only an incidental impact on the ability of our citizens to engage in ordinary private tourist and business travel to a country whose relations with the United States are subject to a comprehensive and longstanding trade and financial embargo.

4. Finally—and significantly—*Kent* raised questions about Congress's substantive constitutional power to regulate at all.[49] The passport denial in *Kent*, based solely on Kent's speech and associational activities, raised obvious First Amendment concerns. See *Haig* v. *Agee*, 453 U.S. at 304 ("*Kent* involved denials of passports solely on

[49] And, of course, *Aptheker* v. *Secretary of State*, *supra*, held that Congress in fact violated the Constitution in denying passports to all members of "Communist organizations."

the basis of political beliefs entitled to First Amendment protection."). It is in *that* context that the Court held that, if Congress is to regulate, it must clearly assert its will to do so.

Here there exists, in our view, no significant substantive constitutional concern. This Court has held that even direct passport controls may be imposed "on the basis of substantial reasons of national security and foreign policy." *Haig* v. *Agee*, 453 U.S. at 293. See also *Zemel* v. *Rusk*, 381 U.S. at 13.[50] As previously indicated, the Cuban Assets Control Program—which only incidentally affects travel—is a central constituent of our foreign and national security policies vis-a-vis Cuba. The United States clearly has a strong interest in limiting the flow of hard currency to Cuba, both directly and for the purpose of deterring development of a strong Cuban tourism industry. In addition, the ability to express serious disapproval of another country's behavior without the use of force, through economic sanctions, is a vital component of our foreign policy. See pages 34-35, *supra*.

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. at 307 (quoting *Aptheker* v. *Secretary of State*, 378 U.S. at 509). "The freedom to travel abroad * * * is subordinate to national security and foreign policy considerations; as such, it is subject

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[50] We note, too, that the Cuban Assets Control Regulations' effect on travel is on international, not interstate, travel. This Court has held that the interest in international travel, unlike the interest in interstate travel, is not a fundamental right. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. at 176-177; *Califano* v. *Torres*, 435 U.S. 1, 4 n. 6 (1978). Although the right of international travel "is a part of the 'liberty' of which the citizen cannot be deprived without due process of law" (*Kent* v. *Dulles*, 357 U.S. at 125), it is not a First Amendment right. See *Zemel* v. *Rusk*, 381 U.S. at 16-17. Thus, courts have not applied the most exacting level of scrutiny to otherwise valid provisions that have the effect of restricting international travel. See *Haig* v. *Agee*, 453 U.S. at 306-307; *Califano* v. *Aznavorian*, 439 U.S. at 177; *Califano* v. *Torres*, 435 U.S. at 4 n.6; *Zemel* v. *Rusk*, 381 U.S. at 16-17.

to reasonable governmental regulation." *Haig* v. *Agee*, 453 U.S. at 306. On several occasions, courts have concluded that the strong interests that underlie the operation of foreign assets control programs under the TWEA are sufficient to justify even actions allegedly infringing on First Amendment rights. See *Veterans & Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs*, 459 F.2d 676 (3d Cir.), cert. denied, 409 U.S. 933 (1972); *Teague* v. *Regional Commissioner of Customs*, 404 F.2d 441 (2d Cir. 1968), cert. denied, 394 U.S. 977 (1969); *American Documentary Films, Inc.* v. *Secretary of the Treasury*, 344 F. Supp. 703, 710 (S.D.N.Y. 1972). And see *Haig* v. *Agee*, 453 U.S. at 308-309; *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980); *Brown* v. *Glines*, 444 U.S. 348, 354-358 (1980); *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972); *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968).

The impact of the disputed regulation on the freedom to travel is narrow. It applies only to a single country—Cuba. Respondents are free to travel elsewhere and to spend as much as they want. In addition, the regulation does not prohibit all travel to Cuba. Its primary impact is on economic transactions incident to ordinary private business and tourist travel. Journalists, professional researchers, close family members, those whose travel expenses are paid for entirely by Cuba, those traveling for humanitarian reasons, and artists and athletes performing in Cuba are not covered by the proscription. The national security and foreign policy interests underlying the Cuban Assets Control Program provide ample constitutional space for such narrowly drawn restrictions.

B. The court of appeals also cited a 1978 amendment to the Passport Act, 22 U.S.C. 211a, in support of its narrow reading of the grandfather clause. That amendment limits the Secretary of State's authority to impose area restrictions on the use of United States passports. Although the amendment does not purport to limit the President's authority to regulate property transactions

under the TWEA, the court of appeals nevertheless concluded (Pet. App. 13a) that it was necessary to read the grandfather clause narrowly in order to harmonize it with the amendment to the Passport Act.

As we have noted, the court of appeals acknowledged (Pet. App. 12a) that the regulation at issue here could be promulgated using the procedures mandated by IEEPA. Thus, the amendment to the Passport Act clearly cannot be viewed as a bar to restriction of travel-related transactions under an emergency economic powers statute. Since nothing in the Passport Act amendment suggests that Congress favored IEEPA procedures over grandfathered TWEA procedures—or in any way adverted to the difference—whenever a regulation may have an incidental effect on international travel, it does not support the court of appeals' construction of the grandfather clause.

Moreover, nothing in the legislative history of the Passport Act amendment—which is addressed only to the Secretary of State, not to the President or the Secretary of the Treasury—indicates that Congress intended to cut back on the powers granted to the Executive under Section 5(b) of the TWEA. The regulation at issue here does not limit the use of passports; rather, it restricts only economic transactions incident to travel. Nor does the regulation have the same effect as an area restriction on passport use, because, as we explained above, it permits property transactions in connection with a number of classes of travel.

This Court has held that repeals by implication are not favored. See *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). Thus, in the absence of any direct inconsistency with the amendment to the Passport Act and in the absence of any reference to exercise of emergency economic powers when Congress considered and enacted the amendment, it should not be assumed that Congress intended an implied partial repeal of the grandfather clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

Prior to its amendment in 1977, Section 5(b)(1) of the Trading With the Enemy Act, 50 U.S.C. App. 5(b)(1), provided:

> During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> > (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
> >
> > (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or

otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625, provides:

> Notwithstanding the amendment made by subsection (a) the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of

the National Emergencies Act [Sept. 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

Section 515.201 of the Cuban Assets Control Regulations, 31 C.F.R. 515.201, provides:

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated under this part, or any national thereof, or such transactions involve property in which a foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect.

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exporation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or in-

strumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) or (b) of this section is hereby prohibited.

(d) For the purposes of this part, the term "foreign country designated under this part" and the term "designated foreign country" mean Cuba and the term "effective date" and the term "effective date of this section" mean with respect to Cuba, or any national thereof, 12:01 a.m., e.s.t., July 8, 1963.

The present version of Section 515.560 of the Cuban Assets Control Regulations, 31 C.F.R. 515.560, provides:

Certain transactions incident to travel to and within Cuba.

(a) (1) *General license.* The transactions in paragraph (c) of this section are authorized in connection with travel to Cuba by:

(i) Persons who are officials of the United States Government or of any foreign government, or of any intergovernmental organization of which the United States is a member, and who are traveling on official business; (ii) persons who are traveling for the pur-

pose of gathering news, making news or documentary films, engaging in professional research, or for similar activities; or (iii) persons, and persons traveling with them who share a common dwelling as a family with them, who are traveling to visit close relatives in Cuba.

(2) For purposes of this section, the term "close relative" means spouse, child, grandchild, parent, grandparent, great grandparent, uncle, aunt, brother, sister, nephew, niece, first cousin, or spouse, widow, or widower of any of the foregoing. The term "close relative" also means mother-in-law, father-in-law, daughter-in-law, son-in-law, sister-in-law, or brother-in-law.

(3) The general license contained in this section does not authorize transactions in connection with tourist travel to Cuba, nor does it authorize transactions in connection with business travel undertaken for any purposes other than those set forth in paragraph (a) (1) of this section.

(b) *Specific Licenses.* Specific licenses authorizing the transactions in paragraph (c) of this section will be issued in appropriate cases to persons desiring to travel to Cuba for humanitarian reasons, or for purposes of public performances, public exhibitions, or similar activities.

(c) The following transactions are authorized in connection with travel to and within Cuba by persons licensed under paragraphs (a) and (b) of this section:

(1) All transportation-related transactions ordinarily incident to travel to and from Cuba.

(2) All transactions ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign

market value not to exceed $100 per person. This authorization may be used only once in every six consecutive months. Single copies of publications do not count against the $100 limit set forth in this subparagraph. For purposes of this section, the term "publications" includes books, newspapers, magazines, films, phonograph records, tapes, photographs, microfilm, microfiche, posters, and similar materials. All merchandise and publications obtained pursuant to this subparagraph shall be for noncommercial use only and shall not be resold.

(4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons to, from, or within Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points outside the United States; chartering an aircraft or vessel; arranging hotel accommodations, ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration for authorized services.

(5) All transactions concerning aircraft or vessels incidental to their nonscheduled flights or voyages to, from, or within Cuba. This subparagraph does not authorize the carriage of any merchandise to and from Cuba, except accompanied baggage and merchandise, including publications, authorized by paragraph (c)(3) of this section.

(6) All transactions incident to the processing and payment of checks, drafts, traveler's checks, and similar instruments negotiated in Cuba by any person under the authority of this section.

(d)(1) This section does not authorize the processing and payment by persons subject to U.S. jurisdiction, such as credit card issuers or intermediary banks, of credit card instruments (e.g., vouchers,

drafts, or sales receipts) for expenditures in Cuba, and does not authorize a domestic credit card issuer, or a foreign credit card firm owned or controlled by U.S. persons, to deal with a Cuban enterprise or with a third-country party, such as a franchisee, in connection with the extension of credit to any person in Cuba.

(2) Persons subject to U.S. jurisdiction are hereby authorized to process and pay credit card instruments for expenditures in Cuba where such instruments are dated prior to May 15, 1982. The authorization contained in this subparagraph shall expire at the close of business on July 15, 1982.

(e) Persons who travel to Cuba for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities are authorized to acquire and import into the United States, as accompanied baggage or otherwise, such publications, as defined in paragraph (c)(3) of this section, as are directly related to their professional activities, without limitation as to value. Such merchandise may be acquired and imported only for their own professional use or that of their employers at the time of the travel, and may not be sold to other persons.

(f) Persons who travel in Cuba pursuant to provisions of this section shall not become nationals of Cuba solely because of such travel. This paragraph does not authorize any transaction prohibited by any other section of this part.

(g) This section does not authorize any person subject to the jurisdiction of the United States to make any investment in Cuba, establish any branch or agency in Cuba, or transfer any property to Cuba, except transfers by or on behalf of individual or group travelers, and aircraft or vessels, as expressly authorized in this section.

(h) *Professional research and similar activities.* (1) Paragraph (a)(1) of this section provides a

general authorization for travel to, from, and within Cuba for professional research. Those covered by the "professional research" authorization are full-time professionals who travel to Cuba to do research in their professional areas, whose research is specifically related to Cuba and will constitute a full work schedule in Cuba, and where there is a substantial likelihood of dissemination of the product of such research. No transactions related to tourist or recreational travel within Cuba are authorized under the general license for professional research, except those that are consistent with a full schedule of research activities.

(2) "Similar activities" include attendance by professionals with an established interest in Cuba at professional meetings where research on Cuba is shared, and travel for research purposes specifically related to Cuba by persons who are working to qualify themselves academically as professionals (*e.g.*, certain graduate degree candidates). Study visits to Cuba in connection with pre-college or undergraduate college course work are not within the scope of professional research and similar activities authorized by the general license.

(3) Categories of travel which do not qualify as professional research or similar activities and for which specific license requests will normally be denied include recreational travel; tourist travel; travel in pursuit of a hobby; general study tours; general orientation visits; student class field trips; youth camps; research for personal satisfaction only; travel by fishing or bird-watching groups and similar affinity groups; and any travel for an authorized research purpose, if the schedule of activities includes free time, travel, or recreation in excess of that consistent with a full work schedule of professional research and similar activities.

(4) A group does not fall within the general license for professional research or similar activities

merely because some members of the group could qualify individually under the general license. For example, the presence of a professional fish biologist who travels to Cuba to engage in professional research does not bring within the general license other persons who might travel with the fish biologist but whose principal purpose in travel is to engage in recreational or trophy fishing. The fact that such persons may engage in certain activities with, or under the direction of, the professional fish biologist, such as measuring or recording facts about their catch, does not bring these individuals' activities within the meaning of professional research or similar activities.

(5) A person does not fall within the general license for professional research or similar activities merely because that person is a professional who plans to travel to Cuba. For example, a professor of history interested in traveling to Cuba for the principal purpose of learning or practicing Spanish or attending general lectures devoted to Cuban culture and contemporary life would not fall within the general license. A doctoral candidate in economics traveling to Cuba to undertake research for a dissertation on the Cuban economy would fall within the general license for activities directly related to the research but would not be authorized by the general license to stay an extra week in Cuba in order to attend a seminar on Cuban arts and crafts.

(i) *Professional Meetings, Seminars, Conferences.* Specific licenses authorizing the transactions in paragraph (c) of this section will be issued in appropriate cases to persons desiring to travel to Cuba for purposes of participation in professional meetings, seminars, conferences, or similar gatherings, provided that the prospective traveler is a full-time professional in the field to which the meeting or similar gathering pertains; that planning and preparation

for the meeting or similar gathering were underway prior to May 15, 1982; and that the meeting or similar gathering is scheduled to be held prior to December 31, 1982. Specific license requests pertaining to travel for attendance at professional meetings to be held after December 31, 1982, will generally be denied.

(j) For purposes of this section, all necessary transactions involving fully sponsored or hosted travel to, from, and within Cuba are authorized, provided that no person subject to U.S. jurisdiction shall make any payment or transfer of any property or provision of any service to Cuba or a Cuban national in connection with such travel. Travel shall be considered fully sponsored or hosted for purposes of this section notwithstanding a payment by a person subject to U.S. jurisdiction for transportation to and from Cuba, provided that the carrier furnishing the transportation is not a Cuban national.

The version of Section 515.560 of the Cuban Assets Control Regulations in effect from March 1977 through May 1982, 31 C.F.R. 515.560 (1977), provided:

Certain transactions incident to travel to and in Cuba.

(a) The following transactions are authorized:

(1) All transactions ordinarily incident to travel to and from Cuba.

(2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person, for personal use only. Such merchandise may not be resold. The authorization in this subparagraph may only be used once in every six consecutive months.

(4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons, to, from, or in Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points outside the United States; chartering an aircraft or vessel; arranging hotel accommodations in Cuba; ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration for authorized services.

(5) All transactions on behalf of aircraft or vessels incidental to nonscheduled flights or voyages to, from, and in Cuba. This paragraph does not authorize the carriage of any merchandise to and from Cuba except accompanied baggage and merchandise authorized by paragraph (a)(3) of this section.

(6) All transactions incident to the processing and payment of checks, drafts, traveler's checks, and similar instruments negotiated in Cuba by any person under the authority of this section.

(7) Processing and payment by United States credit card issuers of credit card instruments (vouchers, drafts, or sales receipts) for authorized expenditures in Cuba forwarded by credit card companies in third countries to the domestic issuer for payment or reimbursement. Foreign credit card firms owned or controlled by U.S. persons are authorized to contract with a Cuban enterprise for the extension of credit through the use of credit cards. However, this paragraph does not authorize a domestic credit card issuer to contract with a Cuban enterprise for the extension of credit to any traveler for any purpose.

(b) Persons who travel to Cuba for the purpose of gathering news, making news or documentary films,

engaging in professional research or for similar activities are authorized to acquire and import into the United States, as accompanied baggage or otherwise, such photographs, films, books, magazines, newspapers, and similar publications as are directly related to their professional activities, without limitation as to value. Such merchandise may only be acquired and imported for their own professional use or that of their employers at the time of the travel, and may not be sold to other persons.

(c) Persons who travel in Cuba after March 18, 1977, and who prior to that date were not designated nationals of Cuba are licensed as unblocked nationals. This subparagraph does not authorize any transaction prohibited by any other section of this part.

(d) This section does not authorize any person subject to the jurisdiction of the United States to make any investment in Cuba, establish any branch or agency in Cuba, or transfer any property to Cuba except transfers by or on behalf of individual or group travelers, and aircraft or vessels, as authorized in this section.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, Secretary of the Treasury, et al.,
Petitioners,

v.

RUTH WALD, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

Congress has enacted a series of measures since 1973 sharply limiting the President's authority to impose emergency restrictions on the activities of Americans at home and abroad, absent the existence of a genuine emergency and consultation with Congress.

Since this Court's decision in *United States* v. *Laub*, 385 U.S. 475 (1967), Congress repeatedly has refused to impose sanctions, criminal or otherwise, for violations of area restrictions on travel, despite open and widespread travel to Cuba and elsewhere in violation of such restrictions and general trade embargoes. In 1978, Congress largely repealed the authority previously delegated to the executive to impose area restrictions. With this background, this case raises four basic questions:

1. Are the executive's April 1982 restrictions on travel barred by the 1978 amendment to the Passport Act?

2. Are the regulations invalid because the Trading With The Enemy Act never authorized regulations criminalizing personal travel expenditures?

3. Since the executive failed to comply with the requirements of the International Emergency Economic Powers Act, are the 1982 Treasury regulations invalid because the authority to regulate travel to Cuba was not being exercised on July 1, 1977?

4. Do the regulations violate respondents' freedom to travel abroad in violation of the First and Fifth Amendments to the Constitution?

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In the

Supreme Court of the United States

October Term, 1983

No. 83-436

Donald Regan, Secretary of the Treasury, et al.,

Petitioners,

v.

Ruth Wald, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

Statutes and Regulations Involved

The relevant statutes and regulations, in addition to those set forth by petitioners, are the International Emergency Economic Powers Act, 50 U.S.C. (Supp. V) §§ 1701 *et seq.* (IEEPA), and the Passport Act of 1926, 22 U.S.C. § 211a, as amended by the 1978 Foreign Relations Authorization Act § 124; Pub.L. 95-426, § 124, 92 Stat. 971, both reproduced in Appendix A *infra*, —— to ——.

Statement

A. *Statutory Background*

In the 1970's, Congress enacted a series of statutes designed fundamentally to reallocate authority over foreign policy from the executive to the legislature, to terminate the executive's unfettered discretion to exercise emergency authorities absent a genuine national emergency, and to limit the executive's authority to curtail the right to travel abroad.

1. In 1973, when a Senate Special Committee on the Termination of the National Emergency began its investigation, it found the field of emergency statutes and procedures in disarray. S. Rep. No. 922, 94th Cong., 2d Sess. 3 (1976).[1] The Special Committee concluded that even though no true national emergency existed, "[a] majority of the people of the United States have lived all of their lives under emergency rule. For 40 years, freedoms and governmental procedures guaranteed by the Constitution have, in varying degrees, been abridged by laws brought into force by states of national emergency." S. Rep. No. 549, 93rd Cong., 1st Sess. 1 (1973). Accordingly, in 1976, Congress terminated the powers and authorities available to the President as a result of the four existing states of national emergency and established procedures by which Congress could more tightly oversee the executive's future exercise of emergency authorities.[2] National Emergencies Act, Pub.L. No. 94-412, 90 Stat. 1255, 50 U.S.C. §§ 1601-1651 (1976) (NEA).

2. Congress next addressed the most fecund statutory source for the perpetual "emergency" regulations during the previous four decades: section 5(b) of the Trading With the Enemy Act (TWEA).[3] In 1977, Congress limited the TWEA authorities to actual wartime situations, and imposed procedural and substantive constraints on the

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[1] In 1973, Congress passed the first of the statutory limits on the President's delegated emergency powers, the War Powers Resolution, Pub.L. No. 93-148, 87 Stat. 555, *codified as amended at* 50 U.S.C. §§ 1541-1548, which restricted the president's power to employ United States forces abroad.

[2] The NEA terminated, two years from the date of enactment, powers and authorities available to the executive pursuant to 470 statutes, as a result of the four states of national emergency in force. 50 U.S.C. § 1601. *See* S. Rep. No. 549, 93rd Cong., 1st Sess. 1 (1973). The legislation also provided for congressional review every six months of future Presidential declarations of emergency and congressional oversight of and accountability for actions taken by the executive in the exercise of delegated emergency powers. 50 U.S.C. § 1621.

[3] Congress had exempted TWEA § 5(b) from the NEA reform pending further study. *See infra* at 34-39.

executive's peacetime use of emergency authorities. *See* International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625, 50 U.S.C. (Supp. V) §§ 1701 *et seq.* (IEEPA).[4] Under IEEPA, the President may exercise emergency authorities only if he declares a national emergency with respect to a specific "unusual and extraordinary threat," consults with Congress before exercising emergency authorities, and reports to Congress every six months; Congress may terminate the declaration by concurrent resolution.[5] The TWEA amendments included a narow "grandfather" or "savings" clause intended to phase out existing regulations promulgated under TWEA § 5(b). *That clause preserved only the § 5(b) authorities exercised by the executive on July 1, 1977.* Because the executive was not exercising authority to embargo travel to, or travel-related transactions with, Cuba on July 1, 1977, that authority was not grandfathered.

B. *Executive Control Over Travel to Cuba*

In 1963, in the aftermath of the Cuban missile crisis, the executive exercised its TWEA powers by promulgating the Cuban Assets Control Regulations, 31 C.F.R. Part 515,[6] which imposed a commercial and financial embargo against Cuba.[7] At the same time, based in large part on the ground that the travel of United States citizens could financially assist Cuba in exporting revolution, the Presi-

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[4] *See* App. *infra* at 1a-4a.

[5] This case does not require this Court to decide whether the provision for termination by concurrent resolution survives *INS v. Chadha*, —— U.S. ——, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983).

[6] 28 Fed. Reg. 6975 (1963).

[7] The OAS resolutions upon which the government relies, Br. 3 n.3, were effectively repealed by Resolution I of the Sixteenth Meeting of Consultation of Ministers of Foreign Affairs (July 29, 1975). The State Department has stated that the 1975 resolution "ended the diplomatic and economic sanctions of the OAS, imposed against Cuba in 1964" and "terminated the OAS requirement of diplomatic and economic sanctions against Cuba." Department of State, *1975 Digest of United States Practice in International Law* 20, 25, 691 (1976).

dent, pursuant to the Passport Act, 22 U.S.C. § 211a, imposed passport restrictions on such travel.[8] For virtually all of the next fourteen years, until the executive's delegated authority to impose area restrictions on passports was severely curtailed by Congress, United States passports were not valid for travel to Cuba.

The original embargo regulations imposed under the TWEA did not mention travel; nor did any amendment to those regulations' purport to forbid travel to Cuba. Treasury's licensing of business travel expenditures was done automatically upon State Department passport validation; there is no evidence that Congress was informed of this practice.[10]

On March 9, 1977, President Carter announced the removal of all restrictions on travel to Cuba in order to comply with the Final Act of the Conference on Security and Cooperation in Europe (1975) (Helsinki accords), which called for freedom of international movement and communication.[11]

The following year, Congress amended the Passport Act to remove the executive's ability to impose area restrictions on travel except during war, armed hostilities, or imminent danger to the public health. Pub. L. 95-426, § 124, 92 Stat. 971, 22 U.S.C. § 211a (1978). Congress, too, acted expressly to achieve greater United States compliance with the Helsinki accords, and to encourage the compliance of other nations as well. Congress believed that "the freedom-of-travel principle is sufficiently important that it should be a matter of law and not dependent upon a particular

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[8] *See infra* at 18-19.

[9] In 1980, 63 years after TWEA's enactment and under the hydraulic pressure of the Iranian crisis, the government invoked IEEPA in an open attempt to ban all travel to Iran. Exec. Order No. 12211, 45 Fed. Reg. 26685 (1980); 45 Fed. Reg. 29287, *adding* 31 C.F.R. § 535.428 (1980) (restricting fully sponsored travel).

[10] *See generally infra* Point II.

[11] *See* 73 Dep't State Bull. 323 (1975) (text of Helsinki accords).

Administration's policy." S. Rep. No. 842, 95th Cong., 2d Sess. 14 (1978). Thus, for all purposes relevant here, Congress repealed the mechanism previously relied on by the executive for every travel restriction imposed during our nation's history, including those issued from 1963 to 1977 to bar travel to Cuba.

Given the 1978 amendment, the current administration was forced to look elsewhere in its desire to restrict travel to Cuba. It therefore promulgated new regulations, claiming authority under TWEA to prohibit all transactions in connection with travel to Cuba,[12] the first explicit attempt in American history to use the TWEA to restrict the travel of Americans.[13] This action, which represented a change in administration policy,[14] was not founded on any declaration of national emergency.

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[12] 50 U.S.C. App. § 16 makes a willful violation of any provision of the TWEA punishable by a $50,000 fine or imprisonment for ten years, or both.

The only method of travel control which the executive had ever before attempted to enforce through criminal sanctions was the regulation of passports. In *United States* v. *Laub*, 385 U.S. 475, 485 (1967), this Court held that the statute relied on by the government to prosecute travel to Cuba, 8 U.S.C. § 1185, did not in fact make such travel a crime, and noted that "the State Department had consistently taken the position that there was *no statute* which imposed or authorized" criminal sanctions upon violation of area restrictions [emphasis added].

[13] The government initially advised persons inquiring that 31 C.F.R. § 515.560 bars travel even if it results in no financial transfers beneficial to Cuba. *See* JA 18 (Mayerson Affidavit); *see also* JA 25 (Treasury Department Statement). Only later, when respondents' counsel asserted that this broad claim showed a governmental intention to bar travel *qua* travel, did the government state that it would not prosecute hosted travel, although not disclaiming authority to do so. This position was later confirmed by regulation, 47 Fed.Reg. 32060 (1982), *codified at* 31 C.F.R. § 515.560(j) (Pet. App. 1).

[14] *See* Dickey, *Central America: From Quagmire to Cauldron?*, 62 Foreign Affairs 659 (1984).

C. *Proceedings Below*

Respondents are American citizens who seek to travel to Cuba for educational, political and religious reasons, and not-for-profit organizations engaged in educational research on Cuba. They include a lawyer, religious leaders and university professors. It is undisputed that respondents' purpose was neither business nor holiday travel, but rather to learn about Cuba, its people and culture, and to establish political contact with the Cuban people.[15] They instituted this suit seeking, on statutory and constitutional grounds, declaratory and injunctive relief against the executive branch's regulations restricting travel.

A unanimous court of appeals ordered the district court to issue the preliminary injunction.[16] The opinions of the court of appeals are a model of judicial analysis based on a careful review of the statutory language, the extensive legislative history, administrative practice, and this Court's rules of statutory construction.[17] Pet. 1a-19a.

The court of appeals held that the Cuban travel regulations lacked statutory authority because the Treasury had failed to "follow the 'consultative' procedures mandated" by IEEPA—"procedures aimed at focusing the attention of Congress as well as the President on the need for the restrictions of the sort at issue here." Pet. 2a. It further held that the regulations were invalid because the grandfather clause amendment to TWEA preserved only those regulations extant on July 1, 1977, and the government on that date was not regulating travel to Cuba.

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[15] JA 2 (Complaint); *id.* at 32-90 (affidavits).

[16] The appellate court subsequently issued a memorandum opinion unanimously denying both the government's petition for rehearing and its suggestion for rehearing *en banc*. Supplemental Opinion, Pet. 18a-19a.

[17] The only other court of appeals which has considered the issue unanimously agreed that the position the government advances here was contrary to the legislative history and purpose of the TWEA's grandfather clause and its function within the broader statutory scheme. *United States* v. *Pryde*, 703 F.2d 1267, 1268-69, *reh. denied*, 717 F.2d 1401 (11th Cir. 1983).

Summary of Argument

This case presents a collision between the Treasury's regulations of April 1982, and two important constitutional principles: the right to travel and the doctrine of *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), that bars the President from issuing regulations contrary to the express will of Congress.

I.

In fulfillment of the 1975 Helsinki accords, President Carter on March 9, 1977 announced the removal of "*any travel restrictions* on American citizens who want to go to . . . Cuba." [18] In 1978, Congress amended the Passport Act to limit the executive's authority to restrict travel to particular countries absent certain extraordinary circumstances not present here. That amendment's express purpose was to safeguard the "freedom-of-travel principle" from the vagaries of "a particular Administration's policy." [19] The Treasury Department, attempting to circumvent the clearly expressed intent of Congress, promulgated the April, 1982 regulations—which the Government concedes will "eliminate tourist and business travel" to Cuba—under the criminal provisions of TWEA § 5(b). JA 25. The specific Congressional policy protecting freedom of travel against area curtailments must take precedence over the general provisions of the TWEA. The 1978 amendment would have no meaningful effect whatsoever were the Court to hold that restrictions on travel to Cuba far more draconian than the civil deterrent outlawed by Congress could be reimposed at any time the executive so desires.

II.

Notwithstanding this explicit protection of the right to travel, petitioners argue that TWEA § 5(b) authorized

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[18] President's News Conference of March 9, 1977, 13 Weekly Comp. Pres. Doc. 328-29 (March 14, 1977) [emphasis added].

[19] S. Rep. 842, 95th Cong., 2d Sess. 14 (1978).

the April 1982 regulation curtailing that right and that the grandfather clause in the 1977 TWEA amendment preserved that authorization. In fact, neither the Congress that passed the TWEA nor later Congresses ever explicitly or impliedly authorized the executive to issue travel-curtailing regulations under the TWEA § 5(b). By enacting two explicit travel control provisions—one in another section of the TWEA and the other in a separate wartime statute—the same Congress that enacted the TWEA indicated its understanding that § 5(b) did not reach travel-related transactions. Since the TWEA's passage in 1917, the executive has never enforced it against the thousands of persons who have openly traveled to nations subject to trade and finance embargoes. Indeed, in *United States* v. *Laub*, 385 U.S. 475 (1967), this Court noted that "the State Department has consistently taken the position that there was *no statute* which imposed or authorized criminal sanctions for violations of geographic travel retrictions." *Id.* at 485 [emphasis added]. During hearings on bills to provide criminal sanctions—bills which were introduced in every Congress from 1958 until 1976—no administration witness ever suggested that the TWEA authorized such sanctions.

III.

In any event, the court below was correct in holding that the 1982 regulations are barred by the 1977 amendment of TWEA and enactment of IEEPA.[10] That legislation had the paramount purpose of terminating the executive's discretionary, unreviewable, and, in the eyes of the key participants in the legislative process, constitutionally suspect use of TWEA § 5(b) emergency authorities as a flexible tool of non-emergency foreign policy. Finding that there was no genuine extant national emergency, Congress included in the TWEA amendments a

[10] The First Circuit's reasoning was adopted in the equally thorough and careful opinion of the Eleventh Circuit in *United States* v. *Frade*, 709 F.2d 1387 (11th Cir. 1983).

narrow grandfather clause in order to preserve existing regulations promulgated under § 5(b). In a compromise reached in the responsible House subcommittee, Congress permitted the President to continue specific existing regulations only to avoid compelling him either to relinquish diplomatic bargaining chips unilaterally or to release assets against which American claimants might recover. Further, having no desire to perpetuate the executive's spurious declarations of national emergency, Congress imposed a national interest standard, rather than a national emergency standard, for the executive's invocation of the grandfather clause. The general purposes of the 1977 legislation and the specific, limited purpose of the grandfather clause are thus fully concordant with the pervasive statements in the legislative history limiting the grandfathered regulations to the specific ones in effect on July 1, 1977. Because the President was not regulating travel to Cuba on that date, his authority to do so was not preserved by the grandfather clause.

IV.

The court below correctly invoked the constitutional right to travel in support of its narrow construction of the grandfather clause. We submit, further, that the Constitution bars the 1982 regulations' criminalization of travel to Cuba. These criminal provisions are a far more severe abridgement of the right to travel than the passport denials at issue in *Kent* v. *Dulles*, 357 U.S. 116 (1958), and its progeny. Unlike *Zemel* v. *Rusk*, 381 U.S. 1 (1965), and *Haig* v. *Agee*, 453 U.S. 280 (1981), the government interest in this case is insufficient to justify such an abridgement. The routine foreign policy interest asserted here pales beside the unparalleled emergency of the Cuban missile crisis, the context of the area restrictions upheld in *Zemel*. Indeed, the 1982 regulations bear only a negligible relationship to the government's purported interest in stopping the flow of currency to Cuba; the government also has at its disposal less restrictive means of serving that interest, means which do not curtail the right to travel.

ARGUMENT

I.

The Travel-Restricting Regulations Promulgated by the Executive Branch Are in Irreconcilable Conflict With and Barred by the 1978 Congressional Amendment to the Passport Act, 22 U.S.C. § 211a.

Prior to 1978, the Passport Act, 22 U.S.C. § 211a, authorized the Secretary of State to "grant and issue passports . . . under such rules as the President shall designate and prescribe. . . ." In 1978, Congress amended the Act to limit the executive's authority to restrict travel to particular countries absent certain extraordinary circumstances:

> Unless authorized by law a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of the United States travellers.

Pub. L. 95-426, § 124, 92 Stat. 971, 22 U.S.C. § 211a (1978).

Notwithstanding express congressional intention to guarantee a right to travel except in those three emergency circumstances specified by statute, the Treasury Department has promulgated travel-restricting regulations with respect to Cuba which the Government concedes will "eliminate tourist and business travel to that country," and, indeed, were admittedly enacted for that very purpose. JA 25. In so doing, it is attempting to circumvent the clear intent of Congress as expressed in the 1978 amendment. The specific policy protecting freedom of travel to Cuba expressed in the 1978 amendment must take precedence over the executive's misreading of the general provisions of the TWEA. *See, e.g., Middlesex County Sewerage Authority* v. *Sea Clammers Association*, 453 U.S. 1 (1981); *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

A. The purpose of the 1978 amendment was not merely to govern the issuance of passports, but rather to guarantee by statute the right to travel except in three situations concededly not present here. By ignoring the express will of Congress to protect what it called "freedom of travel," S. Rep. No. 842, 95th Cong., 2d Sess. 14 (1978), Treasury's regulations transform this carefully considered congressional enactment into an exercise in legislative futility and trivia.

The congressional intent must be examined against the background of *Zemel* v. *Rusk*, 381 U.S. 1 (1965), where this Court concluded that Congress had delegated to the executive the power to deter travel to Cuba by refusing to validate passports for travel there. *Id.* at 7.[11] Renouncing any intention of utilizing even that limited power, President Carter on March 9, 1977 "instructed the Secretary of State to remove any travel restrictions on American citizens who want to go to . . . Cuba," to fulfill his pledge of United States compliance with the Final Act of the Conference on Security and Cooperation in Europe (1975) (the Helsinki accords).[12]

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[11] In *Zemel*, the Court relied on both the broad language of the congressional grant of power and the apparent congressional approval of the executive's settled and publicized practice of declaring passports invalid for the travel of United States citizens to particular countries. 381 U.S. at 8-12. Subsequently, the Court clarified the reach of its holding in *Zemel* when it decided that violation of an executive order or regulation barring the use of passports for travel to particular countries was not criminally punishable. *United States* v. *Laub*, 385 U.S. 475 (1967). The geographical restrictions upheld in *Zemel*, then, were not a "travel ban" as they are usually referred to, but a deterrent, less severe than a ban on travel.

[12] President's News Conference of March 9, 1977, 13 Weekly Comp. Pres. Doc. 328-29 (March 14, 1977). Strengthening the right to travel was a principal purpose of the Helsinki accords, *see, e.g.*, Dep't of State, *1975 Digest of United States Practice in International Law* 7 (1976) (statement of Helsinki accords' protection of "right to travel" by President Ford), and President Carter's action was taken just in time for the scheduled compliance review to be held in Belgrade in 1977. *See generally* Turock, *Freedom of Transnational Movement: The Helsinki Accords and Beyond*, 11 Vand. J. Transnational Law 585, 590 (1978).

Pursuant to his instructions, the State Department allowed its own semi-annual geographic travel restrictions to expire on March 18, 1977,[33] and, consistent with President Carter's instruction *to the State Department* to abolish not simply passport restrictions but "*any* travel restrictions" [emphasis added],[34] evidently assumed responsibility for the removal of any ancillary and subsidiary restraints on the right to travel implemented by other departments.[35]

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[33] 76 State Dep't Bull. 346 (1977). The requirement of periodic issuance appears at 22 C.F.R. Part 51 (1974-77). The last such notice regarding Cuba appears at 41 Fed. Reg. 41105.

[34] *See e.g.*, 13 Weekly Comp. Pres. Doc. 328 (announcing "removal of travel restrictions;" decision to "remove any travel restrictions on American citizens who want to go to . . . Cuba"). *See also id.* at 290-91, 360, 645 ("there are *no prohibitions* against American citizens traveling in the world, initiated by the United States" [emphasis added]); *id.* at 526 ("I have removed restrictions on United States citizens who want to travel abroad. Today there are *no restrictions* imposed by our country" [emphasis added]).

The government's claim that "[i]n March 1977, President Carter decided to modify United States policy with respect to economic transactions incident to travel to Cuba," Br. 8, is thus contrary to the historical record. To be sure, the self-serving gloss thus put on President Carter's March 1977 actions is necessary for the government to avoid the impact of the 1978 amendment, but the facts show without contradiction that the abolition of travel controls to Cuba in March 1977 was motivated by an intention to allow those Americans who wished to travel to Cuba to do so without any governmental restraint—not a temporary desire to adjust the economic embargo. Indeed, no restrictions on economic transactions with Cuba by American citizens (*i.e.*, trade restrictions, banking restrictions, or restrictions concerning blocked assets) were ever lifted by the Carter administration. *See, e.g.*, 78 State Dep't Bull. 57 (1978) (summarizing embargo policy).

[35] For more than a century the State Department has had primary responsibility for determining, as a matter of policy subject to presidential direction, the scope of travel control of United States citizens by whatever means. Thus, the State Department's March 18, 1977 press release stated: "Revisions of the Department of the Treasury licensing procedures affecting the expenditure of funds in the aforementioned countries are in preparation." 76 State Dep't Bull. 346 (1977). Consistent with the announcement, the Treasury Department advised the public on March 29, 1977

Shortly thereafter, President Carter announced his support of legislation which would protect by law travel to Cuba and other countries.[36] Following the President's lead, Congress in 1978 enacted the amendment to the Passport Act.[37] Passing by a substantial margin in both houses with no floor opposition, its legislative history shows that Congress' unequivocal purpose was to prohibit the executive from regulating travel by area restrictions in the absence of war or armed hostilities. The Senate Committee on Foreign Relations began its discussion of the amendment by summarizing the history of the executive's geographic travel limitation authority:

> Before March 1977, U.S. Presidents had for many years used the passport authority to designate certain countries into which the use of a U.S. passport for travel was not authorized. Although *U.S. courts eventually ruled that U.S. law did not actually restrict the travel of a U.S. citizen to any foreign country or area,* the designation regarding the use of U.S. passports in certain countries remained in effect. In March

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that transactions incident to travel were not subject to the governmental regulation or control. 42 Fed. Reg. 16621 (1977). Throughout the Cuban embargo, any control over transactions involving travel expenditures exercised by the Treasury Department was ancillary to the primary controls imposed by the State Department. *See Wald* v. *Regan*, Pet. 6a.

[36] Citing "a need to change basic American law that was written during the cold war" to remove "all restrictions on travel, except those that have to be," President Carter proposed largely repealing the grant of geographic travel control authority this Court had recognised in *Zemel* v. *Rusk*. 13 Weekly Comp. Pres. Doc. 645 (May 3, 1977).

[37] In so doing, Congress expressly referred to "the purpose of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for the purpose of encouraging other countries which are signatories to the Final Act to comply with those provisions. . . ." Pub. L. 95-426, § 124, 92 Stat. 971, 22 U.S.C. § 211a (1978).

> 1977, however, pursuant to a campaign pledge, the President abolished all such restrictions regarding U.S. citizens traveling to specified countries.
>
> Earlier this year, in response to a commitee inquiry, the State Department stated as follows: "In view of the Administration's views on the general principle of freedom of travel, there is no present prospect for the re-establishment of such restrictions." *While fully supporting the Administration's policy, the committee believes that the freedom-of-travel principle is sufficiently important that it should be a matter of law not dependent upon a particular Administration's policy.*

S. Rep. No. 842, *supra* [emphasis added].[38]

The Committee observed that while it had no

> wish to limit the President's ability to deter U.S. citizens from entering countries with which the United States is at war or regions where there are occurring hostilities which relate to American foreign policy interests . . . [it could] conceive of no sound reason, however, for the re-establishment of a U.S. passport policy which identifies certain countries as being politically or ideologically taboo.

Id.

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[38] The amendment to § 211a was not debated on the floor of either chamber. The sections of the Senate Report set forth in the text thus represent virtually the entire substantive legislative history of the amendment, although the transcript of the *Conference on H.R. 12598 before the Comm. on Foreign Relations and House Comm. on International Relations* 40-43 (1978) also illustrates congressional concern, in considering the amendment, with protecting the right of personal travel. *See also* transcripts of *Hearings before the Subcomm. on International Operations of the Comm. on Foreign Relations, Markup of S. 2933* (authorizing 1979 appropriations for the Department of State) (May 3, 9, and 10, 1978).

B. Petitioners argue that the TWEA need not be harmonized with the Passport Act amendment because the latter "does not purport to limit the President's authority to regulate property transactions under the TWEA." Br. 58. This Court, however, has not hesitated to modify even crystal clear provisions of an earlier statute when the legislative *purpose* and *policies* of a later enactment so demand, even when the terms of the later statute do not expressly mandate such a modification. For example, in *Boys Markets, Inc.* v. *Retail Clerks Union, supra*, the Court was faced with the question whether the "literal terms" of the Norris-LaGuardia Act (barring federal courts from issuing injunctions in labor disputes) were modified by § 301(a) of the Labor Management Relations Act, whose terms did not address the question. The Court held that the terms of the earlier statute were modified because congressional labor policy had shifted from protection of the nascent labor movement to promotion of industrial peace and stability. 398 U.S. at 250-51. The Court stated:

> Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions [citations omitted].

Id.

Since the 1978 statute, read in the light of its legislative history, was concededly passed to prohibit the executive from even *deterring* travel to Cuba, surely it must be held to bar the direct imposition of far more drastic travel controls through the back door. Under any realistic reading, the sole purpose behind the 1978 amendment cannot be given any effect without invalidating the present regulation.

We do not believe that this conclusion can be avoided by incantation of the canon that repeals by implication are

disfavored." Even under the usual standards for finding a partial repeal by implication, we think that the 1978 amendment plainly repeals any authority the executive might otherwise have drawn from the TWEA to impose criminal penalties for the mere spending of money in connection with personal travel to Cuba, since that TWEA authority could not be preserved without "ignor[ing] both the history and purposes" of the 1978 amendment. *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974).

Congress expressly recognized in 1978 that "U.S. law [does] not actually restrict the travel of a U.S. citizen to any foreign country or area," S. Rep. No. 842, *supra*, at 14, a conclusion based soundly on *United States* v. *Laub*, *supra*. Nevertheless, Congress passed the 1978 amendment eliminating even the power to deter travel which *Laub* had preserved, so that President Carter's renunciation of that limited *deterrent* power would be fixed into law and not subject to changes of administration or policy. Congress would hardly have gone to the trouble of cabining the President's power even to *deter* travel to Cuba, if, as the government claims, Br. 58, the President retains the power absolutely to restrain such travel under the amorphous "national interest" standard of the TWEA. Nor is it likely that the express commitment Congress made to comply with the Helsinki agreement was only a hollow promise. In short, the power petitioners claim under the TWEA is irreconcilable with the 1978 amendment of § 211a, and renders that statute a meaningless exercise.

Where, as here, Congress has acted to preserve the liberties of Americans by overruling one of this Court's statutory decisions, surely that congressional action should

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" To begin with, that doctrine would be relevant in assessing the effect of the 1978 amendment only if, as is decidedly not the case, Congress had plainly authorized the imposition of controls on travel through currency restrictions. In fact, however, there is no congressional authorization for the present regulation even absent the 1978 statute. *See generally infra* Point II.

not be interpreted in a crabbed and grudging manner. *Cf. Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, —— U.S. ——, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983) (broadly construing statute passed overruling Supreme Court decision).[20]

C. In the court below, petitioners suggested that the 1978 amendment could be harmonized with the power to control travel it contends the TWEA affords. The suggestion was that the two statutes dealt with essentially different subjects—§ 211a with travel restrictions in normal times and the TWEA with travel restrictions in emergencies. The 1978 amendment, however, did *not* address non-emergency situations, leaving emergencies to the TWEA or IEEPA. On the contrary, area restrictions on travel by their very nature were always undertaken to respond to some perceived emergency, and the very purpose of the 1978 amendment was to define the only emergencies in which area restrictions could be imposed, all of which are concededly absent here. *Cf.* 50 U.S.C. § 1701 (narrowly defining emergencies under IEEPA). Absent any of these emergencies, geographic travel restrictions are simply barred.

Nor can the 1978 amendment and the authority claimed under the TWEA be harmonized by contending that Congress would have considered the former to deal only with travel, while the latter authorized purely economic regulations (including, under the government's view, regulations whose impact on travel is far more effective a restraint on travel than direct State Department travel controls).

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[20] In circumstances of far more pressing executive need, where the congressional judgment was plainly not to grant the executive power which it believed to be necessary in wartime for the national security, this Court gave full effect to the congressional decision and ruled the exercise of such power ultra vires. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 586-89 (1952); *id.* at 598-609 (Frankfurter, J., concurring); *id.* at 637-46 (Jackson, J., concurring).

First, every commentator, and evidently every prosecutor, who had ever examined the matter determined that the TWEA was not intended to authorize regulations barring the spending of money for traveling, especially where the very purpose and intended effect of those so-called "economic" regulations was to prohibit travel.[31] Second, Congress has consistently, in reviewing compliance by other nations with the Helsinki agreement, treated economic restrictions on travel similar to those at issue here as contrary to Helsinki's provisions on freedom of movement.[32]

Finally, and perhaps most importantly, the alleged distinction between the "political" reasons for which the State Department's restrictions were imposed and the so-called "economic" reasons for which the present regulations were issued does not exist. The rationales for both the previous travel ban and the present travel-restraining regulations are equally economic and political. Economic embargoes and State Department travel controls have commonly gone hand-in-hand. The State Department's justification for its ban on travel to Cuba in the 1960's was precisely the same—nearly *in haec verba*—with petitioners' justification here.[33] Indeed, the State Department's own pronounce-

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[31] *See generally* Part II, *infra*.

[32] *See, e.g.*, Commission on Security and Cooperation in Europe, *Implementation of the Final Act of the Conference on Security and Cooperation in Europe: Findings and Recommendations Two Years After Helsinki, Report Transmitted to the House Comm. on International Relations*, 95th Cong., 1st Sess. 91 (1977) ("obstacles to travel by Soviet citizens in the West include . . . the small . . . currency allowance"); *id.* at 98 (similar Czechoslovakian restrictions); *id.* at 104 (Hungary); *id.* at 109 ("one considerable restriction [of Poland] is that of foreign exchange . . . ").

[33] *Compare* Department of State, *Passport Restrictions on Travel to Certain Areas* 1 (April 25, 1966) ("to limit the Castro regime's efforts to promote subversion in other countries . . . ") *with, e.g.*, Declaration of Myles Frechette, JA 107 ("[t]he regulations at

ments in imposing travel bans to Cuba and other nations consistently belie the government's present attempt to distinguish between those prior travel restrictions now foreclosed by § 211a and the current Treasury regulations "adopted as a means to impose additional economic costs upon Cuba. . . ."[14]

The challenged regulations do not have merely a remote or incidental effect on the subject of the 1978 amendment; they have precisely the same purpose and effect as did the earlier regulations which Congress has now forbidden. The regulations act as a complete proscription of travel punishable by far more stringent penalties than this Court has already found Congress to have denied. *United States* v. *Laub, supra.*

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issue in this case involve *a partial return to the . . . restrictions on travel related transactions which were in effect between 1963 and 1977.* They were adopted as a means to impose additional economic costs upon Cuba in the face of that country's promotion of armed violence, terrorism, and instability . . ." [emphasis added]). *See generally* JA 106-121, 171-83 (affidavits of government officials reciting political purposes for the present regulations).

[14] Indeed, when the State Department repeatedly sought a criminal penalty for violation of its geographic travel controls in the mid-1960's its principal justification was that such effective controls were needed to deprive affected nations of revenues from tourism. *See, e.g., Proposed Travel Controls: Hearings on S. 3243, Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 44-45 (1966); 56 State Dep't Bull. 102, 103 (1967); Statement of Asst. Sec. for Inter-American Affairs, Dep't of State, *United States-Cuba Trade Promotion: Hearing Before Subcomm. on Int'l Trade & Com. of the House Comm. on Int'l Relations, House of Representatives*, 94th Cong., 2d Sess. 27 (1976). *See also Area Restrictions and the Right to Travel Abroad*, 8 U. C. Davis L. Rev. 401, 423 (1975); Velvel, *Geographic Restrictions on Travel: The Real World and the First Amendment*, 15 U. Kan. L. Rev. 35, 44 (1966); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1147 (1971); Comment, *Executive Restrictions on Travel: The Passport Cases*, 5 Hous. L. Rev. 499, 511-512 (1968).

The Court must give meaningful effect to § 211a, as amended. *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 560 (1963). Respectfully, we do not believe that the 1978 amendment would have any meaningful affect whatsoever were the Court to hold that, despite its enactment into law, restrictions on travel to Cuba far more draconan than those outlawed by Congress could be re-imposed at any time the executive so decides.[25]

[25] Although it is not at issue in this case, we believe that the 1978 amendment bars not only these TWEA regulations but would also bar the promulgation of similar regulations under IEEPA, which was enacted in 1977. The government's contention, Br. 58, that the court of appeals held to the contrary is in error. We understand the First Circuit to have held only that the present regulations are in excess of statutory authority, and to have left for another day the question—whose answer would have been *dicta* in any event—whether the President could have issued similar regulations in consultation with Congress under IEEPA. *See Weld* v. *Reagan*, Pet. 2a.

II.

The TWEA Was Not Intended to and Did Not Make It a Crime to Travel to "Enemy" Countries or to Spend Money in Connection With Such Personal Travel.

A comprehensive report issued in 1958 by a distinguished Special Committee appointed by the Association of the Bar of the City of New York, after examining all of the administrative and legislative materials and consulting high-ranking government officials on travel control, concluded that the "[Trading with the Enemy] Act was never intended to be used as a device for the regulation of travel. . . ." Association of the Bar of the City of New York, *Freedom to Travel* 72 (1958).[16] That conclusion, joined by every commentator, was soundly based on the language, purpose, and legislative history of the TWEA. Since 1958, hundreds of Americans, despite substantial public and congressional criticism, have openly traveled to countries subject to trade embargoes (*e.g.*, China, Cuba, and North Vietnam). The legislative and executive responses to that travel, including lengthy congressional hearings, confirm that the TWEA does not authorize restrictions on personal travel expenditures.

A. Whatever control of travel the United States government exercised either directly or indirectly prior to World War I was wholly entrusted to and exercised by the Secretary of State under the Passport Act of 1856.[17]

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[16] The conclusion of the Special Committee that the Trading With the Enemy Act was not intended to regulate travel, has been supported by every scholarly commentator who has subsequently addressed the issue. *See* Gould, *The Right to Travel and National Security*, 1961 Wash. U.L.Q. 334, 364 n. 135; Note, *Constitutional Protection of Foreign Travel*, 81 Colum. L. Rev. 902, 930, 931 (1981); Levitt, *Legality of the Ban of Travel to Iran*, 12 Colum. Hum. Rts. L. Rev. 91, 99-100 (1980).

[17] *See Haig* v. *Agee*, 453 U.S. 280, 293-95 (1981); *Kemel* v. *Rusk*, 381 U.S. at 8; *Freedom to Travel*, *supra*, at 6-9.

The enactment of the TWEA in 1917 (which was undertaken largely to ameliorate, not tighten, common law rules[38] on trading with the enemy) gave the government no authority to prohibit transactions in connection with personal travel. The President was delegated extensive powers under the TWEA, but the scope of those powers was repeatedly and authoritatively described as involving *commercial* intercourse.[39]

The conclusion that the TWEA as enacted did not authorize restrictions on personal travel need not rest, however, on either the general unsuitability of its language for that purpose[40] or the incompatibility of such a regulation with the commercial and mercantile purpose of the TWEA in general, and § 5(b) in particular. The Congress that enacted the TWEA knew how to write a travel control measure in clear and direct terms. Its passage of two such statutes—one involving aliens in another section of the TWEA itself,[41] and a second governing the travel of

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[38] *See, e.g., Committee Print of the House Subcomm. of Int'l Trade and Com. of the Comm. on Int'l Relations, Trading With The Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency*, 94th Cong., 2d Sess. 47-48, 81, 158-60, 179 (1976) [hereinafter "Committee Print"].

[39] *See, e.g.*, 55 Cong. Rec. —— (1917), *reprinted in* Committee Print at 47-48 (remarks of Rep. Montague, the bill's sponsor); *id.* at 81 (remarks of Rep. Snook); Sen. Rep. No. 133, 65th Cong., 1st Sess. (1917), *reprinted in* Committee Print at 158 (remarks of Rep. Montague); H.R. Rep. No. 85, 65th Cong., 1st Sess. (1917), *reprinted in* Committee Print at 179.

[40] The government's contention that personal travel expenditures may be prohibited as "transactions involving . . . property in which any [designated] foreign country has any interest," Br. 20 n.21, is a conceivable, but strained and artificial reading of the statutory language. The government's construction is so broad as to call into play *Kent's* rule that power to control travel cannot be delegated too broadly and that the Court will narrowly construe all such delegations. *Kent* v. *Dulles*, 357 U.S. at 116, 128-29 (1957).

[41] Section 3(b), now codified at 50 U.S.C. App. § 3(b), makes it unlawful for any person, except with the license of the President,

Americans generally in a separate wartime statute—is wholly inconsistent with the suggestion that § 5(b) of the TWEA can be used to prohibit personal travel expenditures. Indeed, in enacting the latter measure, Congress explicitly noted that restricting American citizens' travel was beyond the TWEA's authority.

In that measure, which this Court has called "the first travel control statute," *Haig* v. *Agee*, 453 U.S. at 296, the 65th Congress acted "[t]o Prevent in time of war departure from or entry into the United States contrary to the public safety." Act of May 22, 1918, ch. 81, §§ 1-2, 40 Stat. 559. This statute made it unlawful "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe," for "any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport." *Id.* Enactment of this legislation just seven months after the TWEA, and by the same Congress, demonstrates contemporaneous congressional recognition that the TWEA was not meant to, and did not, reach travel. The congressional reports explicitly confirm this construction.[42]

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to transport or attempt to transport into or from the United States, or for any owner, master, or other person in charge of a vessel of American registry to transport or attempt to transport from any place to any other place, any subject or citizen of an enemy or ally of enemy nation, with reasonable cause to believe the person transported or attempted to be transported is such a subject or citizen. (*See* H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3 (1918) (discussing Section 3(b) of the TWEA)).

[42] The House Report accompanying the travel control bill highlights congressional recognition that the TWEA did not address or provide for restrictions on travel:

> This bill is intended *to stop an important gap* in the war legislation of the United States. [Some journeys by *alien* enemies] are now partially restrained by section 3(b) of the Trading With The Enemy Act. *Even this act leaves American citizens and neutrals perfectly free to come and go.* . . . The Attorney General has formally ruled that neither the President nor the

B. From its passage in 1917 until the 1970s, not a single public action by the executive branch or word uttered in Congress suggests that the TWEA could be used to regulate or prohibit personal travel expenditures.

There was no use of the TWEA for travel transactions in World War II. To the contrary, even during that enormous crisis, President Roosevelt's executive order exempted from embargo $500 monthly for "living and traveling expenses . . . within *any* foreign country," including all countries subject to German control. General License No. 33, pursuant to Exec. Order No. 8389, 3 C.F.R. 645 (1940) (Sept. 10, 1940, amended, Oct. 23, 1941). *See generally* 28 Fed. Res. Bull. 1088 (1942).[42]

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executive departments have power to curb the general departure and entry of travelers.

New legislation is the only remedy. In his address to Congress on December 4, 1917, the President emphasized the necessity of creating "a very definite and particular control over the entrance and departure of all persons into and from the United States." The Attorney General in his report for 1917 made a similar recommendation . . . [Existing regulations of alien travel and Section 3] of the Trading With The Enemy Act represent practically the only existing enforceable provisions for controlling foreign travel. *It will be noted that they apply exclusively to persons who by birth or citizenship are directly connected with hostile countries.*

H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3 (1917) [emphasis added]. *See also 1917 Att'y Gen. Ann. Rep.* 16 (recommending "passage of a law conferring on the President power to regulate . . . departure of all persons, both citizens and aliens, to and from the United States and its possessions during a state of war"); *1918 Att'y Gen. Ann. Rep.* 39-40 (noting that despite the "Secretary of State['s] . . . restrictive powers under section 3(b) of the trading with the enemy act . . . proper regulation was found to be impossible. . . . Appreciating the situation Congress passed an act . . . which empowered the President to exercise control over the departure and entry of all persons . . . ").

[42] President Roosevelt's judgment not to proscribe travel (or indeed living) expenditures in even enemy nations under the TWEA is surely a telling comment on how far we have come in our understanding of the extent to which individual liberties in a free so-

Nor was there any attempt until this case to rely on the TWEA to deter travel to other nations, many of which were, and all of which could have been, subject to embargo. This failure to invoke the TWEA is particularly significant given the congressional opposition to various judicial decisions upholding the right to travel, and extensive hearings held in an attempt to grant a broad travel control authority to the executive.[44]

In light of extremely widespread and notorious travel in violation of various State Department area bans, including the Cuban ban upheld in *Zemel*, the failure to prosecute such travelers for their travel expenditures under the TWEA is powerfully indicative of the joint judgment of the executive and Congress that travel (including the expenditures without which travel is impossible) was not a crime.[45] American journalists openly traveled to China in the face of a TWEA embargo similar to the general embargo on Cuba;[46] literally hundreds of

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ciety may be abridged for the interests of the state. Nor can the form of President Roosevelt's judgment—phrased as a general license for travel expenditures of $6,000 yearly—be considered a discretionary determination to *permit* expenditures which could have been proscribed. As discussed *infra* at 47-48, given the structure in which TWEA regulations have arbitrarily been cast, as a general prohibition with various exceptions, there was no good way to make explicit the TWEA's failure to cover personal travel expenditures except by a statement of non-coverage.

[44] *See infra* n. 47.

[45] *See generally Kent* v. *Dulles*, 357 U.S. at 127-28 (failure to exercise claimed power when occasion called for its exercise indicative of lack of authority). Although widespread enforcement is not indispensable to finding implied congressional approval of a power where it has been openly asserted and where there have not been "frequent occasions" for its use, *Haig* v. *Agee*, 453 U.S. at 302, the power has not been openly asserted here in the manner canvassed in *Agee*, and the occasions for its use have numbered in the hundreds if not thousands. *See infra* pp. 26-27.

[46] The report of the City Bar describes a trip by three American newsmen who traveled to China for *Look* magazine, which was the

Americans openly traveled to and spent money in Cuba despite geographic and trade restrictions imposed after the missile crisis;[47] and numerous opponents of the Vietnam war—including Harrison Salisbury, Ramsey Clark, Jane Fonda, and others less well known—traveled openly and without a single prosecution under the TWEA to

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subject of extensive press coverage. "Shortly after three United States newsmen traveled to Communist China in violation of the ban on such travel, the Department of State announced that it would refer the cases to the Treasury Department for possible prosecution under the Trading With the Enemy Act. *Plans for such prosecution were later abandoned, apparently for the reason, which the Committee believes to be sound, that successful prosecution was not possible under the provisions of that Act. The Act was never intended to be used as a device for the regulation of travel or passports.*" *Freedom to Travel, supra*, at 72 (footnotes omitted) [emphasis added].

[47] *See, e.g., United States* v. *Laub, supra*, 385 U.S. at 485 (over 600 individuals who traveled to Cuba despite the area restrictions upheld in *Zemel* v. *Rusk, supra*). Similarly, in early 1970, it was widely reported that 687 Americans went to Cuba to engage in eight weeks of cutting sugar cane without any attempt of prosecution by the Government. *N. Y. Times*, Apr. 29, 1970, at 3, col. 2; *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1144 n.48 (1971). In testimony before a Subcommittee on the Judiciary, one member of the Laub delegation testified that he spent over $100 in Cuba on his trip and stated that the Cuban government told the group that "we could change our money from dollars to pesos and at the end of the trip any unused pesos could be changed back to dollars on a 1 to 1 basis." *Violation of Foreign Travel Restrictions: Hearing Before Subcomm. No. 1 of the Comm. on the Judiciary, House of Representatives*, 85th Cong., 1st Sess. 35 (1963). Indeed, it was reported to a congressional committee that while purchase of souvenirs incident to travel was purportedly prohibited under the Cuban Assets Control Regulations, no American has ever been actually prosecuted, although "senators, congressmen, congressional aides, and hundreds of others" had violated this rule. *United States-Cuba Trade Promotion: Hearing Before the Subcomm. on Int'l Trade and Com. of the Comm. on Int'l Relations, House of Representatives*, 94th Cong., 2d Sess. 10 (1976). So far as we have been able to ascertain, no one engaging in transactions in connection with either personal or business travel to Cuba was ever prosecuted or even threatened with prosecution under the TWEA.

Hanoi, notwithstanding a general trade embargo[45] and widespread criticism from the executive, Congress, and the press.[46]

Indeed, government instructions included on every passport at this period expressly advised that travel to Cuba, North Korea, and North Vietnam was lawful. Moreover, although passports did contain Treasury Department warnings (on the page providing "General Information") against the "unlicensed purchase or importation of merchandise" from those countries, there was no warning that personal travel expenditures—which encompass payments for transportation, lodging and board—fell under the warnings. The implication could not have been plainer to all passport holders—including, presumably, all Senators and Congressmen—that travel expenditures *were* lawful.[47]

The freedom of such travel and travel expenditures from proscription under the TWEA was implicitly recognized by this Court in *United States* v. *Laub, supra*, which

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[45] *See* 31 C.F.R. Part 500 (1968).

[46] *See, e.g., N.Y. Times*, July 28, 1972, at 3, col. 5; *id.*, Aug. 15, 1972, at 1, col. 6; *id.*, Aug. 24, 1972, at 9 col. 1; 118 Cong. Rec. 31423-26, 32320-24, 32593-95, and 33186-98 (1972). A House Committee studying the matter summarized: "a substantial number of United States citizens have traveled abroad to hostile areas [such as North Vietnam]" without ever being prosecuted. H.R. Rep. No. 248, 93d Cong., 1st Sess. 2 (1973). The report was extremely critical of the travel, but did not even suggest that it could be prosecuted for violating the embargo.

At least two bills reported out of committee during this period would have authorized sanctions for violation of restrictions on travel to countries engaged in armed conflict with the United States, such as Vietnam. *See* H.R. 16742, debated, 118 Cong. Rec. 33197 (1972); H.R. Rep. No. 248, 93d Cong., 1st Sess. 2 (1973). These bills would have been unnecessary had the TWEA already authorized such sanctions.

[47] The sample passport is included in the *Hearings Regarding H.R. 16742: Restraints on Travel to Hostile Areas, House Comm. on Int. Sec.*, 92nd Cong., 2d Sess. 7566 (1972), and reproduced, *infra*, as Appendix B.

observed that "the State Department ha[s] consistently taken the position that there was *no statute* which imposed or authorized" criminal sanctions for violations of geographical travel restrictions. 385 U.S. at 485 (1967) [emphasis added]. Even after *Laub* held that § 215(b) of the Immigration and Nationality Act, 8 U.S.C. § 1185, did not provide for criminal sanctions for violations of area restrictions, the executive still placed no reliance on the TWEA. Instead, it turned to administrative sanctions enforced by the State Department. 31 Fed. Reg. 13544, *codified as* 22 C.F.R. § 51.74 (1967). This practice was declared invalid in *Lynd* v. *Rusk*, 389 F.2d 940, 946-47 (D.C. Cir. 1967). Even then, however, the government did not turn to the TWEA to provide the criminal sanctions for travel to embargoed nations like Cuba and North Vietnam.

Legislative measures were introduced in every Congress from 1958 until 1976 to provide for criminal sanctions for violations of area restrictions.[51] Many of these bills were introduced at the request of the executive,[52] and numerous congressional hearings were held on these bills.[53]

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[51] Note, *Area Restrictions and the Right to Travel Abroad*, 8 U. C. Davis L. Rev. 401, 426-427 (1975).

[52] In 1958, President Eisenhower asked Congress "for clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives. . . ." H.R. Doc. No. 417, 85th Cong., 2d Sess. 1-2 (1958). Eisenhower thus believed that the TWEA gave him no such authority. Ehrlich, *Passports*, 19 Stan. L. Rev. 129, 147 n.81-84 (1966).

[53] *Hearings on Restraints on Travel to Hostile Areas, H.R. 1594 (Clean Bill H.R. Rep. No. 8023), H.R. 278, H.R. 297, H.R. 2691, H.R. 3999, H.R. 6047 Before the House Comm. on Internal Security*, 93d Cong., 1st Sess. (1973); *To Restrict Travel of U.S. Citizens to Countries in Armed Conflict with the United States, Hearings Before the Senate Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); *Hearings Regarding H.R. 16742: Restraints on Travel to Hostile*

In not one of these hearings did any administration witness ever suggest that the TWEA authorized criminal sanctions for violation of area restrictions or even mention the TWEA as a possible source of criminal sanctions. Instead, every administration witness continued to claim that "there is *no statute* with which a person can be effectively prevented from traveling to an unauthorized area." *Hearings Regarding H.R. 16742: Restraints on Travel to Hostile Areas Before the Committee on Internal Security, House of Representatives*, 92d Cong., 2d Sess. 7561 (1972) (statement of W. Olson [emphasis added]). *See also* H.R. Rep. No. 248, 93d Cong., 1st Sess. 18 (1973) (Department of Justice view is that "area restrictions today are ineffective since the Secretary has no realistic means of enforcing them").

Thus, even with respect to travel to countries, such as North Vietnam, which were engaged in armed conflict with the United States and embargoed, State and Justice Department witnesses from various administrations consistently concluded that no sanctions of any sort existed. If the executive believed that personal travel for which money was spent could be controlled under the TWEA, surely that claim would have been made during the two decades of congressional attention to this problem. Given the strong desire, born of national security concerns, of every administration from 1957 through 1976 to enforce area restrictions effectively, the fact that the TWEA was

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Areas, Before the Comm. on Internal Security, 92d Cong., 2d Sess. (1972); *Proposed Travel Controls, Hearings on S. 3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Sen. Comm. on the Judiciary*, 89th Cong., 2d Sess (1966); *Violation of Foreign Travel Restrictions, Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary*, 85th Cong., 1st Sess. (1963); *Passport Legislation, Hearing Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. 17-18, 71-72 (1959); *Hearing on the Right to Travel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. Part II, 190-195 (1957).

never relied upon or even mentioned by the executive (or anyone else) as providing the authority to prohibit travel or travel transactions compels rejection of any claim that the TWEA can now be invoked to justify that power.

In light of these facts, it is hardly surprising that none of the voluminous commentary appearing between 1940 and 1980 addressing geographic travel restrictions and the sanctions available for violation of those restrictions concluded that the TWEA provided an alternative authority for the administration to prohibit travel or travel transactions already subject to area controls.[54] To the contrary, the scholarly community, like Congress and the statements of the executive to Congress, all agreed that after *Laub* any geographic restrictions on travel were enforceable *only* through the limited deterrent effect of passport invalidations.

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[54] In a comprehensive article in 1940, a distinguished scholar, Professor David Riesman, Jr., canvassed all possible sources of executive authority to restrict travel as well as applications of that authority, and although he was plainly familiar with the Act, gave no indication that the TWEA had any relevance to the question at all. *See* Riesman, *Legislative Restrictions on Foreign Enlistment and Travel*, 40 Colum. L. Rev. 793 (1940). The Riesman article describes specific congressional attention to the problem and provision for it in specific statutes or resolutions which did *not* include the TWEA. *See also* Note, *The Right to Travel Abroad*, 42 Fordham L. Rev. 838 (1974); Rauh & Pollitt, *Restrictions on the Right to Travel*, 13 Case W. Res. L. Rev. 1 (1961); Note, *Area Restrictions and the Right to Travel Abroad*, 8 U. C. Davis L. Rev. 401 (1975); Note, *Constitutional Law; Right to Travel versus Power to Conduct Foreign Affairs: Area Restrictions on Passports: Zemel* v. *Rusk*, 50 Cornell L.Q. 262 (1964). Comment, *Executive Restrictions on Travel: The Passport Cases*, 5 Hous. L. Rev. 499 (1968); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1141-1153 (1972) (discussing area restrictions); Velvel, *Geographical Restrictions on Travel: The Real World and the First Amendment*, 15 U. Kan. L. Rev. 35 (1966); Erhlich, *Passports*, 19 Stan. L. Rev. 129 (1966); Note, *Travel and the First Amendment: Zemel* v. *Rusk*, 13 U.C.L.A. L. Rev. 470 (1966).

C. The express congressional recognition during World War I that the TWEA did not authorize prohibition of personal travel transactions and the total absence for a half century after its passage of any claim that it could be so used,[15] are fatal to finding congressional authority for the challenged regulations.

An implied congressional authorization such as this Court found in *Zemel*, 381 U.S. at 7-12, and *Agee*, 453 U.S. at 293-303, is totally lacking. There, this court found that the legislative history of the original statute (the Passport Act) did not bar the claimed power, and that Congress, in enacting subsequent travel legislation in 1952, impliedly approved the executive's open assertion and application of that power. Here, by contrast, the TWEA was never intended to control and has never been used against travel expenditures, despite literally hundreds of opportunities to do so.[16]

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[15] The government has not provided any evidence that the executive publicly asserted a power to control travel expenditures in a way likely to have come to the attention of Congress. The materials the government submitted to the court of appeals after oral argument on which it now relies, Br. 21 n.22, to show implied congressional approval (correspondence with businessmen and lawyers concerning business travel expenditures and a note in the State Department's Foreign Affairs Manual) were not presented to Congress, and differ from the showing of longstanding and openly asserted authority relied upon in *Zemel* and *Agee*. Moreover, this Court's reminder in *INS* v. *Chadha*, —— U.S. ——, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), that Article I authority must be exercised in conformity with constitutionally mandated procedures renders the government's attempt to wring legislative authorization from several equivocal statements by executive officials singularly unpersuasive.

[16] *See Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) (congressional acceptance not a relevant criterion to judge the validity of restrictions promulgated under IEEPA in light of legislative intent which contradicts the use of the claimed power).

III.

The Regulations Are Not Authorized by Public Law 95-223 Because the Executive Failed to Comply With IEEPA and the Authority to Embargo Travel or Travel-Related Transactions With Cuba Was Not "Being Exercised" on July 1, 1977.

Petitioners concede that, in promulgating the April 1982 regulations, the President did not comply with IEEPA, and that those regulations were not predicated upon a national emergency. Petitioners construe the grandfather clause in isolation from the broad remedial purposes of Public Law 95-223, and in disregard of its language, purpose and legislative history.

A. *The Legislative Purpose, History and Language of IEEPA and the Grandfather Clause Overwhelmingly Support the Decision of the Court of Appeals.*

1. *Legislative Purpose.* Public Law 95-223, which in 1977 amended the TWEA and enacted IEEPA, had a single paramount purpose: to terminate the executive's discretionary, unreviewable, and, in the eyes of the key participants in the legislative process, constitutionally suspect use of TWEA § 5(b) emergency authorities as a flexible tool of non-emergency foreign policy. The "dominant movement and fundamental purpose[]" of the Act, to borrow petitioners' phrase,[57] was thus to slam the door on the very "background" of flexible executive "emergency" action to which petitioners appeal in an attempt to obscure the overwhelming legislative history supporting the decision below. Petitioners' strained reading of this remedial legislation is based on a supposed standard created by the very wrongful conduct Congress sought to stop.

In 1973, during the climax of Watergate and the denouement of Vietnam, Congress began the arduous legisla-

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[57] *See* Br. 38.

tive process of reallocating authority in foreign policy-making—particularly emergency and wartime policy—from the executive to the legislative branch. The Senate Special Committee on the Termination of the National Emergency concluded that "[f]or 40 years, freedoms and governmental procedures guaranteed by the Constitution have, in varying degrees, been abridged by laws brought into force by states of national emergency." S. Rep. No. 549, 93rd Cong., 1st Sess. 1 (1973).

The most fertile statutory sources for the perpetual "emergency" regulations during those forty years were the wide-ranging authorities over trade and finance, both domestic and international, conferred by TWEA § 5(b).[18] Invoking that provision, successive presidents had promulgated fully discretionary and unreviewable economic controls on the basis of unexpired (and also unreviewable) declarations of "national emergency" that were decades old and wholly unrelated to the problems addressed by those controls.[19]

Congress' initial remedial step, the National Emergencies Act (NEA) of 1976, 50 U.S.C. §§ 1601 *et seq.*, terminated emergency authority under declarations then in effect, and limited the President's future declarations of national emergency and exercise of emergency authorities. The Senate Special Committee report on the NEA re-

[18] That provision was initially intended to authorize embargoes only during times of actual war. Act of Oct. 6, 1917, ch. 106, 40 Stat. 411. Under the exigencies of the Great Depression, Congress ratified President Roosevelt's March 6, 1933 bank holiday Proclamation, and amended TWEA § 5(b) to authorize such economic controls "[d]uring time of war or during any other period of national emergency declared by the President." Act of Mar. 9, 1933, ch. 1, 48 Stat. 1, 12 U.S.C. § 95a, 50 U.S.C. App. § 5.

[19] The Cuban regulations extant on July 1, 1977 were based on President Truman's 1950 declaration of national emergency in connection with the Korean War. *See Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 17 (Statement of Prof. A. Lowenfeld).

iterated that "protections and procedures guaranteed by the Constitution have, in varying degrees, been abridged by Executive directives whose legality rests on the continued existence of Presidentially proclaimed states of emergency." S. Rep. No. 922, 94th Cong., 2d Sess. 1 (1976).[40] In view of these findings, the NEA was designed to "ensure that the powers now in the hands of the Executive will be utilized only in time of genuine emergency. . . ." *Id.* at 18.

TWEA § 5(b) authorities were exempted from the NEA reform pending further congressional study. At the 1977 Subcommittee Hearings on TWEA, however, Representative Bingham, the principal legislative sponsor of Public Law 95-223, emphasized that this exclusion "was not meant to exempt forever the Trading With The Enemy Act from the intent of Congress that emergency powers should not be available for routine application."[41]

From the earliest stages of the Subcommittee Hearings, the dominant theme was the executive's wrongful use of § 5(b) emergency powers as a flexible instrument of non-emergency foreign policy. Every expert witness urged remedial legislation to stop such use of § 5(b) authorities.[42] The subcommittee discussed the possibility of recasting

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[40] Noting that "broad economic measures" were often passed "with virtually no consideration of a law's effect on civil liberties," the Senate Special Committee stated that "the time has come to reverse the pernicious habits of the past." *Id.* at 13.

[41] *Emergency Controls on International Economic Transactions: Hearings before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations*, 95th Cong., 1st Sess. 111 (1977) (hereinafter "Subcommittee Hearings").

[42] *See, e.g., Subcommittee Hearings, supra*, 13 (statement of Prof. A. Lowenfeld) ("no practical constraint limiting actions taken under emergency authority to measures related to the emergency"); *id.* at 39 (statement of Prof. S. Metzger) (§ 5(b) "has been used *generally* for purposes related to the national security and the conduct of the foreign relations of the United States." [emphasis added]; *id.* at 30 (statement of Prof. H.G. Maier) ("Sec. 5(b)'s

§ 5(b) as standard nonemergency legislation. Administration spokesmen, however, questioned the legality of exercising § 5(b) powers in the absence of a true national emergency. Julius Katz, Assistant Secretary of State, testified that "there is a substantial legal question as to whether action not related to declared national *emergencies* or to some other *equivalent* evidence of overriding national interest would find . . . support in the courts." *Id.* at 100 [emphasis added]. The leading administration spokesman at the hearings, C. Fred Bergsten, Assistant Secretary of Treasury, raised the possibility that the exercise of § 5(b) powers in the absence of a true "emergency" was constitutionally infirm. *Id.* at 104. He added:

> [W]hile the flexibility afforded by section 5(b) is both necessary and desirable in emergency powers, such flexibility would be inappropriate to standard, nonemergency legislation.
>
> . . . [T]his Administration strongly believes that the [§ 5(b)] powers should only be used on a truly emergency basis.

Id. at 108-9.

Summarizing Mr. Katz' and Mr. Bergsten's view, Congressman Bingham stated, "As I understand the testimony, both of you indicate that it is not possible to do any of the things that we now do on the theory that emergencies exist, under some other theory by appropriate legislation." *Id.* at 118.[83] The notion of recasting § 5(b) powers into nonemergency legislation was dropped.

The subcommittee and the administration also agreed that a true state of emergency did not exist either generally

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effect is no longer confined to 'emergency situations'. . . ."); *id.* at 83 (statement of P. Weiss) ("The [TWEA] is a prime example of the unchecked proliferation of Presidential power for purposes totally unforeseen by the creators of that power."). All of these expert witnesses were quoted in the House Committee report. H.R. Rep. 459, 95th Cong., 1st Sess. 7-9 (1977).

[83] Mr. Katz agreed with Representative Bingham's summary, with two exceptions not pertinent to the Cuban situation. *Id.*

or with respect to Cuba. Representative Bingham expresed vigorous agreement with Mr. Bergsten's statement to the subcommittee:

> Mr. Bergsten, I really think that your statement suggests that we are playing fast and loose with the Constitution. We are relying on an emergency which does not exist to justify a taking, or actions taken by the administration.
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> • • •
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> . . . [T]he executive branch wants to be free to continue to act with an enormous degree of discretion on the basis that an emergency exists, although by no commonsense application of the term could the situation be called an emergency. *Id.* at 112-13.

Representative Bingham made it clear on at least three occasions that relations between Cuba and the United States were not in a state of emergency.[44] Administration spokesmen concurred.[45]

This express evidence of legislative purpose, supported by the detailed legislative history set forth below, rebuts the petitioners' contention that Congress intended to give the executive broad, expanding and flexible authorities under the grandfather clause to act in a non-emergency situation. Congress did indeed provide the executive with flexible authority to expand a regulatory program, but only in the event of a true emergency in which IEEPA was properly invoked and complied with. It was in the context of such a genuine, declared national emergency that the Court upheld such flexibility in the Iranian situation. *Dames & Moore* v. *Regan*, 453 U.S. 654, 662 (1981). Petitioners' reliance on executive "flexibility" assumes the relevance of the very foundation on which *Dames & Moore* and the IEEPA authorities rest—that is, the existence of a genuine emergency.

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[44] *See id.* at 110, 117, 119.

[45] *See, e.g., id.* at 193 (remarks of L. Santos).

In light of the dominant purpose of preventing the executive from issuing new emergency regulations absent a true emergency, Congress permitted the President to continue old regulations on the basis of an annual declaration that such continuation was in the "national interest," rather than an annual declaration of national emergency. Congress desired neither to "sanction the phony character of the emergency" that ostensibly underlay the Cuban regulations, *id.* at 210 (remark of Rep. Findley), nor to create an incentive for the executive to perpetuate the "fiction[]" that regulations issued under § 5(b) were based on a true emergency. *Id.* at 136 (remark of Rep. Bingham). Petitioners erroneously consider the "national interest" standard for invoking the grandfather clause to be a "substitute for new declarations of national emergency," Br. 29, with no effect on the degree of flexibility to which the executive is entitled. In fact, Congress chose the lower standard in recognition that there was no extant emergency to justify the flexible expansion of existing regulations.

Congress had two specific purposes in allowing the President to continue existing regulations.[**] First, the legislators were concerned that the President should not be forced to give up diplomatic bargaining chips by ending existing controls without winning concessions from those nations subject to those controls. Professor Lowenfeld argued that the Cuban trade regulations "should not be terminated without some kind of quid pro quo" or "without any understanding." *Id.* at 10. Mr. Bergsten concurred in the view that the President should be able to continue the "status quo" only so as not to damage his "negotiating position." *Id.* at 113; *see also id.* at 103 (statement of C.

[**] Several subcommittee members initially opposed grandfathering of any § 5(b) regulations. *Id.* at 167 (remarks of Rep. Cavanaugh); *id.* at 210 (remarks of Rep. Findley). *Id.* at 119 (colloquy between Rep. Bingham and Mr. Bergsten). The two key strictures contained in the grandfather clause—permitting the preservation only of specific existing regulations and only on a "national interest" standard—reflect the narrow *compromise* reached between the subcommittee and the administration.

Fred Bergsten) (unilateral termination of embargoes would undermine bargaining position). Second, Congress did not want to release frozen assets against which American claimants might eventually recover. *Id.* at 103-4 ("Loss of control of these assets would deprive American claimants against these countries of the security afforded for their private claims by this collateral.")

Neither of these purposes underlying the grandfather clause supports the petitioners' desired expansion of the specific regulations in effect on July 1, 1977. Congress was reluctant to wipe the slate clean by compelling the President to relinquish bargaining leverage without a diplomatic *quid pro quo*, but did not intend the grandfather clause to serve as the President's *carte blanche* to *augment* his bargaining power by issuing new emergency regulations absent a true emergency. Nor did Congress indicate any intent to permit the executive to create *new* pools of frozen assets by the continued "phony" use of emergency powers. *Id.* at 210 (remark of Rep. Findley).[47]

These clearly articulated legislative purposes—underlying both Public Law 95-223 as a whole and the grandfather clause—are antipodal to petitioner's call for executive "flexibility".[48] That call—the echo of discredited ex-

[47] Congress provided the executive with flexible authority to increase his bargaining leverage by issuing new regulations, but only if the executive complied with IEEPA.

[48] The general purposes of Public Law 95-223 and the specific purposes of the grandfather clause thus reinforce the well-established canon that grandfather or savings clauses require narrow, strict interpretation, *e.g. Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Gregg Cartage & Storage Co.* v. *United States*, 316 U.S. 74, 83 (1942), as do both criminal statutes, *e.g., United States* v. *Laub*, 385 U.S. 475, 480 (1967), and statutes affecting basic liberties. *E.g., NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 504-507 (1979); *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958). Contrary to petitioners' contention, there is nothing anomalous about allowing the executive to continue, but not to expand, existing regulations. The central purpose of grandfather clauses is to *phase out* the offending conduct.

ecutive abuses of emergency authorities—cannot drown out the overwhelming chorus of legislative and executive voices explicitly limiting the grandfathered regulations to the specific ones in effect on July 1, 1977.

2. *Legislative History.* The court below was not speaking hyperbolically when it stated that "throughout the committee hearings and the House and Senate reports, *nearly every time* a legislator referred to the 'savings clause' and to the exercise of the TWEA 'authorities,' he spoke of specific, existing *'uses'* of those authorities." Pet. 7a [first emphasis supplied].[9]

Congressman Bingham observed:

> [I]f the President has not up to now used some authority that he has under section 5(b) in connection with those cases where 5(b) has been applied, I don't know why it should be necessary to give him authority to expand what has already been done. It is really going beyond grandfathering.
>
> It seems to me that grandfathering applies to what has been done to date. . . .

Subcommittee Hearings, supra, at 167. Similar statements in the legislative materials are legion.[10]

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[9] The Eleventh Circuit agreed fully with the First Circuit's reasoning. *United States* v. *Frade,* 709 F.2d 1387 (11th Cir. 1983).

[10] *E.g., id.* at 189 (statement of Rep. Bingham) ("it was the purpose of [the grandfather clause] to grandfather in *existing uses* of section 5(b)"); *id.* at 168 (statement of Rep. Cavanaugh) ("where the powers of 5(b) are *currently operative*"); *id.* ("the current *employments* [of controls]"); *id.* at 182 (statement of Rep. Cavanaugh) ("ongoing *uses* of 5(b)"); *id.* at 147 (statement of R. Roger Majak, Staff Director of Subcommittee on International Economic Policy & Trade) ("There is a clear need to grandfather or deal in some special way with *existing* uses of section 5(b) authorities. . . ."); *Revision of Trading With the Enemy Act: Markup Before the House Committee on International Relations,* 95th Cong., 1st Sess. 9 (1977) (hereinafter, "Markup")

Rarely do legislators from both parties speak with such unanimity and clarity on the meaning of a statutory provision.[71] More rarely still does such explicit Congressional bipartisan interpretation of a particular provision stand in such complete harmony with the express purposes of the overall statutory scheme. The only construction of the grandfather provision consistent with the legislative purposes discussed above is that in fact enunciated repeatedly and in the clearest terms by the legislators: without properly declaring a legitimate national emergency, the executive should be permitted to carry forward only the specific existing regulations issued under § 5(b) and could not make new use of emergency authorities.[72]

3. *Language.* That these legislators meant exactly what they said is conclusively shown by the subcommittee's al-

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(statement of Rep. Bingham on behalf of the Subcommittee) *id.* at 9 ("So the subcommittee settled on a *limited* grandfather of *existing uses* of international economic emergency authorities."); *id.* at 7 ("*future actions* and policies in this area must be subject to [the IEEPA] procedures"); *id.* at 10 (statement of Representative Whalen) ("[W]e have stipulated Presidential discretion *to continue any controls currently in effect*"); H.R. Rep. No. 459, 95th Cong., 1st Sess. 2 (1977) ("[*C*]*urrent uses* of those authorities . . . may continue."); *id.* at 11 ("[E]xercise of emergency powers under section 5(b) which are currently in progress should generally be exempted.") [all emphasis added].

[71] As the court below stated:

> "[A] reading of the history of IEEPA and the TWEA amendments suggests, *even more strongly than a few quotations can indicate*, that Congress intended IEEPA, not the old TWEA, to apply to particular restrictions, such as Cuban travel, not in effect in July 1977." Pet. 11a [emphasis added].

[72] The government's specious counter-argument—that Congress sought to remedy the President's unconstitutional use of emergency powers by granting him the unchecked discretion not only to expand those abuses generally, but also to expand them into the particular, constitutionally sensitive area of the right to travel—is too dubious a ground for disregarding or warping the explicit references to existing, specific "uses," "actions," "controls" and "regulations" that pervade the legislative discourse.

teration of the grandfather clause during the hearings. An early draft of the clause provided:

> (1) any authority conferred upon the President by section 5(b) of the Trading with the Enemy Act, which is being exercised with respect to a set of circumstances on the date of enactment of this Act as a result of a national emergency declared by the President before such date of enactment, may continue to to be exercised with respect to such set of circumstances; and
>
> (2) *any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances. . . .*

Amendments to the Trading With the Enemy Act: Subcommittee Working Draft of June 8, 1977, 95th Cong., 1st Sess. § 101(b) [emphasis added]. Subcommittee Staff Director Majak explained that under the second provision,

> with respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those *particular* authorities that he is now using, but any others which are conferred by section 5(b).
>
> • • •
>
> . . . I think it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the *particular* authorities themselves and their *usage.*

Subcommittee Hearings, supra, at 167 [emphasis added]. Congressman Bingham responded:

> I have a serious question about that. It seems to me that if the President has not up to now used *some* authority that he has under section 5(b) *in connection with those cases where 5(b) has been applied,* I don't

> know why it should be necessary to give him authority to *expand* what has already been done. It is really going beyond grandfathering.
>
> It seems to me that grandfathering applies to what has been done to date, and that should be ample authority.

Id. [emphasis added]. The subsequent alteration of the provision into its present form represented a double narrowing of the authorities preserved. First, the phrase "with respect to a set of circumstances" was changed to "with respect to a country," ensuring that regulations in effect against one country could not be expanded to cover another country. Second, the second provision in the early draft was deleted to ensure that if some specific regulations were in effect against a country, more expansive regulations could not be promulgated against that country. As Congressman Bingham stated, "in connection with those cases where 5(b) has been applied," the President should not be given authority to "expand what has already been done." *Id.*

The plain meaning of Congressman Bingham's words is the only meaning consistent with the explicit statutory purpose of stopping the President from continuing to invoke §5(b) emergency authorities for new regulations for non-emergency foreign policy purposes. Petitioners' contention, Br. 48 n.44, that Congressman Bingham's remarks show "on their face" that he was concerned at most that one broad category of authorities not be used as a predicate for the exercise of a different broad category is simply mistaken. While a subcommittee staff member casually referred to "asset controls" and "currency controls," *id.*, (which appear nowhere as defined categories of authorities in the TWEA statutory scheme[12]), Representative Bingham's was the key legislative voice. The plain

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[12] *See supra Point II.*

meaning of his words cannot be obscured by even the most ingenious formalistic categorizing."[74] He said simply and unequivocally that the President should not be permitted to do any more than had already been done, even with respect to a country already under § 5(b) regulation.

Of course, the clear premise of Congressman Bingham's statement is that not *all* § 5(b) authorities were being exercised with respect to the countries against which *some* § 5(b) authorities were being exercised. Contrary to petitioners' argument, this authoritative statement by the leading legislative spokesman cannot be overridden by the plainly self-serving, and in any event incorrect remarks by a low-level Treasury official that "all that [§ 5(b)] powers conferred are [already] exercised." *Id.* at 188 (Leonard Santos, attorney adviser, Dep't of Treasury).[75] No one else during the legislative process suggested that all § 5(b) authorities were already being exercised against all countries or against any one country.[76] Indeed, the contrary view was repeatedly expressed during the hearings in the presence of Santos and without his objecton. *See, e.g., id.* at 167 (statement of Rep. Bingham); *id.* at 108 (statement of Mr. Bergsten) (embargo under Foreign Assets Control Regulations, which "parallel" Cuban regulations, does not cover "travel"). In fact, Mr. Santos himself later stated that the grandfather clause did not

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[74] In any event, as we demonstrate below, the court of appeals correctly concluded that if categorical lines are to be drawn, travel-related transactions form a distinct category of § 5(b) authorities. *See infra* at 47-54.

[75] Petitioners argue that Santos's remark shows that the second provision of the early drafts of the grandfather clause was surplusage and that its deletion therefore does not support the decision below. *See* Br. 48-49.

[76] Even petitioners—who, before falling back to less radical positions, make the extreme argument that all *property* transactions were being regulated with respect to Cuba—do not go so far as to contend that *all* § 5(b) authorities were being exercised with respect to Cuba.

preserve the use of emergency powers "with respect to a new country, *or* with respect to a situation that did not exist at the time this law goes into effect." *Id.* at 212 [emphasis added]. The second clause of this disjunctive would itself have been surplusage had Santos' earlier claim—*i.e.*, that all § 5(b) powers were being exercised—been true. Moreover, as the court below detailed, the administration spokesmen for the bill—including Santos himself—repeatedly and overwhelmingly spoke of the authorities preserved in the same terms used by the legislators, that is, in terms of preserving specific existing regulations and prohibiting any new action under § 5(b) authorities. *Id.* at 211 (remarks of Santos); *see also* Pet. 8a-9a (citing five such remarks by Santos. Congressman Cavanaugh questioned Mr. Bergsten of the Treasury Department about the meaning of the grandfather clause:

> Mr. Cavanaugh: . . . First of all, Mr. Bergsten, would it be your understanding that section 101 [the grandfather clause] would *strictly limit* and *restrict* the grandfathering of powers currently being exercised under 5(b) to those *specific* uses of the authorities granted in 5(b) being employed as of June 1, 1977.
>
> Mr. Bergsten: Yes, sir.
>
> Mr. Cavanaugh: And it would preclude the expansion by the President of the authorities that might be included in 5(b) but are not being employed as of June 1, 1977."
>
> Mr. Bergsten: That is right.

Markup, supra, at 21 [emphasis added].

Petitioners contend that a few references in the legislative history to the existing trade or finance "embargo" with Cuba and other countries somehow extinguish the per-

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" The cutoff date was later advanced to July 1, 1977, for reasons not pertinent here. *See* H.R. Rep. 459, 95th Cong., 1st Sess. 11 (1977).

vasive references—"nearly every time a legislator" spoke—to "specific, existing *'uses'* of those authorities." Pet. 7a [court's emphasis]. No one denies that there was a trade embargo against Cuba on July 1, 1977 or that the existing embargo was preserved by the grandfather clause. By the same token, it is unarguable that there was no embargo on travel or travel-related transactions with Cuba on that date.[18] The references in the legislative history to existing "embargoes" only strengthen our contention that, because there was no exercise of the authority to regulate or embargo travel-related transactions on July 1, 1977, such authority was not preserved by the grandfather clause.[19]

Petitioners, seeking to avoid this uncomfortable conclusion, argue that "Congress was aware that embargoes are adjusted over time to meet changing foreign policy needs." Br. 45. It is true that Congress was aware that Presidents before 1977 had resorted to new emergency regulations to conduct specific trade and finance embargoes as a flexible tool of routine foreign policy. That practice, however, is precisely what Congress decided to stop by the 1977 enactment of IEEPA and amendment of TWEA.

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[18] Mr. Bergsten noted explicitly in a prepared statement that the Foreign Assets Control Regulations, which "parallel" the Cuban Assets Control Regulations, embargoed "current transactions" but not "travel." *Subcommittee Hearings*, *supra* at 108. This considered, prepared description of the limits of the existing embargo represented the view of the entire executive branch. *Id.* at 110 (statement of Mr. Bergsten).

[19] The House Report explicitly states that a general license—such as the 1977 Carter authorization of travel-related transactions to Cuba—constitutes a *lifting* of a pre-existing "embargo." H.R. Rep. 459, *supra* at 6; see *infra* at 48.

Moreover, the language of the grandfather clause does not bear petitioners' reading. If Congress had intended to grandfather entire flexible systems or programs of controls, rather than specific exercises of authority, it would hardly have done so by grandfathering the particular authorities "being exercised."

B. *Petitioners' Assorted Theories Are Not Only Contradicted by the Legislative History and Purpose, But Would Afford the President Limitless Discretion to Impose New Emergency Regulations Against All Countries Absent a True Emergency, the Very Practice Congress Sought to Stop.*

Each of petitioners' alternative constructions of the grandfather clause is either contradicted by the explicit legislative history and purposes or analytically incoherent —or both.

1. Petitioners' first theory is that the President may exercise all § 5(b) authorities with respect to a country against which he was exercising any § 5(b) authority on July 1, 1977. This theory is refuted by the abundant legislative history making clear that if the President were exercising only *"some* [§5(b)] authority" *in a particular case,* he should not be given "authority to *expand* what has already been done." *Subcommittee Hearings, supra* at 167 [emphasis added].[20]

The practical and conceptual incongruity of petitioners' initial theory is made plain by the fact that on July 1, 1977, *some* § 5(b) authorities were being exercised with respect to *every* country in the world. For example, the Treasury's Transaction Control Regulations, promulgated under § 5(b), on that date barred "transaction[s] involv[ing] the shipment from *any foreign country* of any [strategic] merchandise" to any of sixteen listed countries.[21] 31 C.F.R.

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[20] As we have shown, more extensive grandfathering would have subverted Congress' paramount purpose: to stop the issuance of new emergency regulations to implement non-emergency foreign policies.

[21] There was a general license authorising shipments of strategic goods from Canada, West Germany, France, the United Kingdom, and other countries. 31 C.F.R. § 505.31(a)(2). Under petitioners' "general license theory", *see infra* at 47-49, and "three-fold category theory," *see infra* at 49-51, the grandfather clause permits the President to now exercise § 5(b) emergency authorities to impose a total trade and travel embargo against our NATO allies, even in the absence of a declared national emergency.

§ 505.10 (1977 [emphasis added]. Petitioners' theory would thus render pointless Congress' enormous effort and clear intent in enacting IEEPA and amending the TWEA, for the President's power to exercise *any* § 5(b) authority with respect to *any* foreign country absent a true national emergency would be preserved.

2. Petitioners' second theory is that President Carter's 1977 refusal to exercise § 5(b) authority to embargo travel to Cuba was in fact an exercise of authority taking the form of a general license to a broader prohibition on certain economic transactions. The court below correctly refused to countenance such a transparent subordination of substance to form.

The fact is that on July 1, 1977, a United States citizen could exercise his constitutional right to travel to Cuba and make the necessary travel expenditures without permission from the United States government. No regulations required him to keep a record of or, upon return, to make a report concerning such expenditures. Travel-related expenditures with Cuba were in every substantive sense unregulated on July 1, 1977.

Congress could not have contemplated that this substantive *non-exercise* of regulatory authority could be transformed into the "exercise" of authority by the wholly contingent choices of the draftsmen at the Office of Foreign Asset Controls (OFAC). That is, OFAC could have restricted some transactions while permitting others in one of two ways: (1) by simply restricting the former, or (2) by restricting all activities but granting a so-called general license for the latter. Surely Congress did not intend that the outcome of a grave reallocation of power between the executive and legislative branches be determined by such arbitrary drafting decisions.[22]

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[22] This problem is not hypothetical. See the discussion of the China regulations, *infra* at 48-49.

The *reductio ad absurdum* of petitioners' general license theory is that the grandfather clause would have preserved all of the executive's § 5(b) authorities if OFAC had imposed *no* controls, with no effect whatsoever on economic transactions or travel, but had issued a general license for all § 5(b) transactions. Unlike petitioners' *reductio* regarding cigars and cigarettes, Br. 26, ours is more than hypothetical. On July 1, 1977, the Foreign Assets Control Regulations included a so-called general license for "all transactions with China or its nationals. . . ." 31 C.F.R. § 500.546 (1977).[13] That this total non-regulation—whose purpose and effect is no different than if Treasury had simply never issued any transaction regulations with respect to China—should be the predicate for permitting the President to now exercise emergency authorities to impose a total trade, finance, and travel embargo against China absent a true national emergency, is nonsensical.

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[13] The general license included a narrow exception for transactions in strategic merchandise. 31 C.F.R. § 500.546 (1977). The regulations with respect to China thus consisted of a broad prohibition on transactions, an equally broad "general license", and a narrow exception to the general license. The identical substantive result, of course, would have been more rationally achieved by simply prohibiting transactions in strategic merchandise. The case of China thus demonstrates that, contrary to petitioners' contention, the use of a general licensing scheme is neither "necessary" nor "obvious[ly]" rational. Br. 22, n.23. As discussed *supra* at 47-48, the use of a general license depends on the wholly contingent choices of the OFAC regulatory draftsmen.

The conceptual incoherence of petitioners' general license theory is implicitly conceded by petitioners in their consistent failure to include China in their list of countries as to which there was an existing exercise of authority over property transactions on July 1, 1977, *see* Br. 7, 14, 39, 45, notwithstanding the general license for all transactions with China. During the legislative process the legislators and administrators also failed to include China in their references to existing trade embargoes, suggesting that petitioners' conceptual tricks were not in the minds of those who wrote the grandfather clause. *See, e.g.*, *Subcommittee Hearings*, *supra*, at 103, 108 (Mr. Bergsten); *id.* at 147 (Mr. Majak); 123 Cong. Rec. 38166 (1977) (remarks of Rep. Bingham).

Yet that would be the necessary result if the Court adopts petitioners' general license theory.

3. Petitioners' third theory is that three broad categories of authorities are somehow immanent in the "structure" of § 5(b): (1) authority over currency, bullion and securities; (2) authority over property; and (3) vesting authority. Aside from the fatal conceptual flaws in this scheme,[44] it is, for the same reasons as petitioners' first theory, contradicted by the explicit legislative history and purposes. No reference was made in the legislative process to aggregate categories of grandfathered authorities; rather, Congress made overwhelmingly clear that it wanted to preserve only "what has already been done." *Subcommittee Hearings, supra* at 167 (statement of Rep. Bingham). Moreover, under petitioners' third theory, the grandfather clause would preserve the President's authority to impose a total trade and travel embargo against every

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[44] The complex assortment of overlapping regulatory subject matters and tools in § 5(b) in no way sorts itself inherently into petitioners' three purported categories. The first purported category contains three specific types of property (currency, bullion, securities) which are the subject matter upon which various regulatory tools (investigation, regulation, prohibition)) may be exercised. The second purported category (property), however, *includes* the three specific subject matters that make up the first category, as petitioners recognize. *See* Pet. Br. 20, n. 21. The third purported category (vesting) is not defined by a subject matter of regulation, as are the first two categories, but by a regulatory tool; and it too is included in the regulatory tools ("nullify," "transfer," "compel") of the second category. *See Dames & Moore* v. *Regan*, 453 U.S. 654, 672 n.5 (1981). The three categories are therefore taxonomically inconsistent, and, in any event, conflate into a single subsection of § 5(b). This ramshackle threefold categorization is thus hardly inherent in the "structure" of § 5(b). In any event, when Rep. Cavanaugh asked what the "current uses" of § 5(b) were, the Subcommittee Staff Director answered not by citing the "structure" of § 5(b), but by pointing to "the thick volume compiling the *regulations* . . . which have been issued pursuant to this statute." *Subcommittee Hearings, supra* at 168 [emphasis added]. Those regulations, of course, included an entirely separate section that deregulated travel to Cuba.

and any foreign country, since on July 1, 1977, Treasury regulated *some* property transactions involving every foreign country. 31 C.F.R. § 505.10; *see supra* at 46-47.

Even if Congress had intended to grandfather aggregated categories of § 5(b) authorities, Judge Breyer's conclusion that the authority to impose travel-related regulations and the authority to regulate ordinary commerce and finance are distinct is supported by the consistent practice and pronuoncement of all three branches of government. Pet. 5a-7a. As detailed above, *see supra*, Point II, the very Congress that enacted the TWEA did not understand § 5(b) to empower the executive to curtail travel; and subsequent legislative actions, from 1956 through 1978, indicate the same congressional undertstanding. *See supra*, Points I and II.[35] The executive branch has not brought a single enforcement proceeding—under either TWEA, its predecessor statutes, the Non-Intercourse Acts of the nineteenth century, or its successor, IEEPA—against the thousands of American travelers to embargoed countries. *See supra*, Point II.[36] Indeed, the Carter Administration's deregulation of travel-related transactions with Cuba was guided by broad concerns about personal liberty and not by the traditional parameters of foreign policy toward Cuba, which continued to govern other categories

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[35] Indeed, when regulations of travel was mentioned during the House Subcommittee Hearings on TWEA in 1977, it was always distinguished from regulation of ordinary financial or commercial transactions. *See Subcommittee Hearings, supra* at 4, 15 (Prof. A. Lowenfeld) (distinguishing trade, finance, and travel); *id.* at 108 (C. Fred Bergsten) (travel distinguished from "current transactions"); *id.* at 215 (L. Santos) travel distinguished from exchange of goods).

[36] In his sweeping January 15, 1934 Executive Order issued under the authority of § 5(b), President Roosevelt was careful to ensure the non-regulation of economic transactions for "reasonable traveling and other personal requirements" and to distinguish them from the category of transactions for "commercial or business requirements." Executive Order 6560. *See supra* n.43.

of transactions.[87] Finally, this Court has repeatedly instructed that the Constitution treats delegated authorities that "curtail" or "dilute" the right of travel in a distinctly different way than authorities to regulate ordinary commerce. *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *see infra* Point IV.

The three branches thus speak with a single voice in consistently expressing the categorical distinction between travel and travel-related transactions, on the one hand, and ordinary commercial transactions, on the other. Banning the purchase of cigars *is* categorcially distinct from banning access to the means of travel. Smoking cigars, unlike travel, has yet to receive recognition by all three branches as the exercise of a personal liberty.

4. Finally, petitioners theorize that a broad reading of the grandfather clause is required to avoid a two-track system, under which old regulations would be subject to a national interest standard and new regulations would be subject to the true national emergency standard. Br. 29-30. Petitioners' theory is based on a misreading of IEEPA. Indeed, petitioners themselves concede elsewhere that under IEEPA, once the President declares a national emergency, that declaration suffices for a single, flexible ongoing system of regulation. Br. 28. In short, once IEEPA is invoked, its single track is adequate to carry all regulations with respect to that emergency.[88]

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[87] The Reagan Administration itself acknowledged that the "values served by the right of international travel" require special treatment of travel-related transactions as a category. *See* Pet. Br. in the Court of Appeals 42.

This awareness of the distinctive nature of travel and travel-related transactions is embedded in the very structure of the executive branch. The State Department has jurisdiction over travel curtailment; the Treasury Department oversees ordinary trade regulation; and Treasury has no independent decision-making function as to travel-related transactions. *See supra* n.5.

[88] It is true, of course, that absent a genuine emergency, petitioners are confined to the grandfather clause "track," which permits the President to continue only existing regulations.

IV.

The Regulations Deprive American Citizens of Their Freedom to Travel in Violation of the First and Fifth Amendments to the Constitution.

The regulations making expenditures for personal travel a felony carrying severe terms of imprisonment and criminal fines violate the constitutional liberty of international travel.

A. In five major decisions since 1958, this Court has expressly recognized that international travel, as well as interstate travel, is a constitutional right with First Amendment implications, a right protected by the due process clause of the Fifth Amendment. The first such decision was *Kent* v. *Dulles*, 357 U.S. 116 (1958), where the Court held that "[t]he right to travel is a part of the 'liberty' of which citizens cannot be deprived without due process of law under the Fifth Amendment." *Id.* at 125.

Relying heavily upon the writings of Professor Zechariah Chafee, the Court emphasized "how deeply ingrained in our history this freedom of movement is." *Id.* at 126. The Court further found that "Freedom of movement also has large social values," *id.*, and cited Professor Chafee's reminder that travel enables an American citizen to be "well informed in public issues" so that he is not "obliged to form his opinions about our foreign policy from United States government officials or "a few correspondents of American newspapers." *Id.* at 127.

This ruling that travel is a constitutionally-protected right was reaffirmed in *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), *Zemel* v. *Rusk*, 381 U.S. 1 (1965), *United States* v. *Laub*, 385 U.S. 475 (1967), and *Haig* v. *Agee*, 453 U.S. 280 (1981). In each of those cases, the Court carefully analyzed the refusal of a passport, amounting to only a *deterrent* of travel, under heightened scru-

tiny as a restraint on a constitutionally protected liberty. Since the prohibition on the spending of money to travel to Cuba is, in fact, an absolute ban on travel for most Americans, it is subject to at least the same heightened judicial scrutiny. We do not understand petitioners to disagree."

B. The regulations challenged here cannot be sustained under the analysis of *Aptheker* and *Zemel* without sanctioning a power to limit international travel wholly inconsistent with our traditions and freedoms. Indeed, affirmance of the present restrictions would transform the Court's ruling in *Zemel*—which upheld limited restrictions in the extreme context of the Cuban missile crisis—into sanctions for permanent travel controls, not only to Communist nations, but to any nation, whenever the executive (ap-

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" *See, e.g.*, Br. 56-57 (defending regulations as "narrowly drawn restrictio[n]" serving "compelling" interest of "security of the nation"). To the extent that the government relies on *Califano* v. *Aznavorian*, 439 U.S. 170 (1978), any such reliance is misplaced. *Aznavorian* simply applied the rule that unintended, "incidental" burdens on protected rights arising as a consequence of otherwise valid welfare benefit statutes not aimed at the exercise of those rights will be upheld where no greater than necessary to accomplish the governmental aim. Thus, the Court in *Aznavorian* stressed that "[t]he statutory provision in issue here does not have nearly so direct an impact on the freedom to travel internationally as occurred in the *Kent*, *Aptheker*, or *Zemel* cases. It does not limit the right to travel on grounds that may be in tension with the First Amendment. It merely withdraws a governmental benefit. . . ." *Id.* at 177. The truly "incidental" restriction occasioned by the welfare benefits statute in *Aznavorian* can hardly be compared with or judged by the same standards as the regulation here, which is not an unintended and unavoidable burden on the right to travel, but rather a direct intentional curtailment of that right. The Court observed in *Zemel* that "we must, if we are to approach the constitutional issues presented by this appeal candidly, proceed on the assumption that the Secretary's refusal to validate a passport for a given area acts as a deterrent to travel to that area." 381 U.S. at 13-14. The government's claim that *Kent*—but not this case—"involved a direct and purposeful prohibition on the right to travel," Br. 53, forsakes *Zemel's* candor and functional approach for semantic tricks.

parently in its unreviewable discretion) deems them to be a convenient foreign policy tool.

1. The restriction here is far more substantial than those upheld in *Zemel* and *Agee*, or struck down in *Aptheker*. The government has not merely withheld its diplomatic protection for travel, either as to an individual or a particular country; instead, it has imposed severe criminal penalties on the spending of even minimal amounts of money for personal travel. For respondents and, indeed, for nearly all Americans,[90] the restriction is tantamount to—and, as a practical matter, indistinguishable from—a criminal penalty on travel itself. *See Buckley* v. *Valeo*, 424 U.S. 1, 16-19 (1976).

2. The area restriction upheld in *Zemel* was far less restrictive than the regulation challenged here, and it was also supported, this Court found, "by the weightiest considerations of national security. . . ." 381 U.S. at 16.[91] *Zemel*, as the Court noted, came in the wake of the Cuban missile crisis, and cannot be understood outside that context. As Professor Tribe has suggested, "the power approved in *Zemel* must be limited to the most extraordinary situa-

[90] Other than those of Cuban descent.

[91] The Court referred to the executive's determination "that travel between Cuba and other countries of the Western Hemisphere is an important element in the spreading of subversion" and that "in the early days of the Castro regime, United States citizens were arrested and imprisoned without charges," 381 U.S. at 14-15, citing the statute authorising extraordinary powers to secure the release of such persons. *Id.* It held that "the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel." *Id.* It analogised the Cuban situation to "areas ravaged by flood, fire or pestilence," suggesting that in such situations, "when it can be demonstrated that unlimited travel to the area would indirectly and materially interfere with the safety and welfare of the Nation as a whole," the right to travel could be restricted. *Id.* at 15-16.

tions." L. Tribe, *American Constitutional Law* 957 n.22 (1978).

A decision upholding the present regulation would not limit the executive's authority to "emergency" situations. To the contrary, Congress specifically found in enacting the National Emergency Act, IEEPA, and the 1978 amendment to the Passport Act, that there *is* no emergency at present, only the "normal" tensions inherent in contemporary international affairs. Thus, upholding these regulations would inevitably insulate from constitutional attack any geographic travel bans based on the interest of reducing another nation's hard currency earnings by eliminating American travel expenditures.

Given this threadbare justification, we are unable to discern (and the government does not provide) any limiting principle which would prevent petitioners from prohibiting travel expenditures even to friendly countries in order to pressure changes in their policies.[33] Travel expenditures to Israel, for example, could be forbidden to express disapproval of, and induce a change in, Israeli West Bank policy; to England to pressure surrender of the Falklands; or to Italy to cajole the government to exclude Italian Communists from the Cabinet. No member of the Court, though, has ever suggested that travel could be infringed on so flimsy a pretext; not only are the Court's own cases strongly to the contrary, but Congress' 1978 commitment to the right to travel through implementation of the Helsinki accords, *see infra* Point I, also forbids such an approach.

Moreover, the regulations challenged here, which block the exercise of a constitutional right on penalty of criminal prosecution, fail significantly to further the interest of denying revenues to Cuba. The annual hard currency value of travel to Cuba by United States nationals in the

[33] This is *precisely* the justification relied upon by defendants. JA 107-8, ¶¶ 8, 9 (Declaration of Myles Frechette).

year prior to the promulgation of the regulations amounted to only approximately $20 milion, JA 19, and the regulations by petitioners' own admission affect only $8 million of that total. By contrast, under current regulations, several hundred million dollars of hard currency are transmitted to Cuba every year by foreign-based affiliates of United States corporations. *Id.*[11] There is, then, not only a less restrictive alternative available to the government for achieving its goals, but an entirely non-restrictive alternative. *See Aptheker, supra.*

Finally, the third interest asserted by the government, "the ability [the restriction provides] to express serious disapproval of another country's behavior without the use of force through economic sanctions," cannot justify the regulations. First, it again proves far too much, since it would justify travel bans to any country with which our government has a dispute. Second, that justification is precisely the kind rejected by Congress, in 1978, in prohibiting the use not only of "ideological" but also of "political" rationales to justify area restrictions. *See supra* at 18-20. Moreover, the restriction is unnecessary to further that interest; the present administration's unambiguous expression of disapproval of Cuban conduct hardly

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[11] *See* Affidavit of Harold Mayerson, accompanying respondents' Opposition to Application for a Stay Pending Petition for a Writ of Certiorari (June 1983). Nor does the regulation rationally advance the government's additional stated goal of "deterring development of a strong Cuban tourism industry," Br. 56, precluding as it does those, like respondents, who are not the sort of travelers of which a tourist industry can be made. For example, respondent Fran Bradley sought to lead a trip of Quaker high school students to visit (and stay with) the Friends community in Cuba and a youth camp for international students. JA 82-94. Respondent Alice Hageman sought to lead a trip of lay people and clergy to study religion in Cuba. JA 75. *Compare Aptheker* v. *Secretary of State*, 378 U.S. at 512 (passport revocation overbroad since passports are withdrawn not only for travel to meet with Soviet officials in U.S.S.R. but also for innocent purposes). For description of the inadequacies of Cuba as a resort for the American market, *see* Mayerson Affidavit, *supra*.

requires amplification purchased at the cost of the constitutional right to travel.

In short, petitioners have not sufficiently shown that their regulations, which will severely curtail respondents' freedom to travel to Cuba, are necessary to further substantial government interests. Accordingly, even if authorized, the regulations must be found constitutionally invalid.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed. In the alternative, the matter should be remanded for further proceedings to permit respondents to demonstrate that the regulations are not sufficiently necessary to further substantial governmental purposes to survive constitutional scrutiny.

Respectfully submitted,

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March 14, 1984

APPENDIX A

Statutes Involved

The 1978 Foreign Relations Authorization Act §124; Pub. L. 95-426, §124, 92 Stat. 971, *now codified at* 22 U.S.C. §211(a), provides:

Limitation on Geographical Travel Restrictions in United States Passports

> Sec. 124. For the purpose of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for the purpose of encouraging other countries which are signatories to the Final Act to comply with those provisions, the first section of the Act entitled "An Act to regulate the issue and validity of passports and for other purposes", approved July 3, 1926 (22 U.S.C. 211a), is amended by adding at the end thereof the following: "Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

The International Emergency Economic Powers Act, 50 U.S.C. (Supp. V.) §§1701-1706, provides in relevant part:

> TITLE II—INTERNATIONAL EMERGENCY ECONOMIC POWERS
>
> Situations In Which Authorities May Be Exercised
>
> Sec. 202. (a) Any authority granted to the President by section 203 may be exercised to deal with any

unusual and extraordinary threat, which has its source in whole or substantial part outside the Unted States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 203 may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

Grant of Authorities

Sec. 203. (a)(1) At the times and to the extent specified in section 202, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof.

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to,

or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

• • •

Consultation and Reports

Sec. 204. (a) The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this title and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Whenever the President exercises any of the authorities granted by this title, he shall immediately transmit to the Congress a report specifying—

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

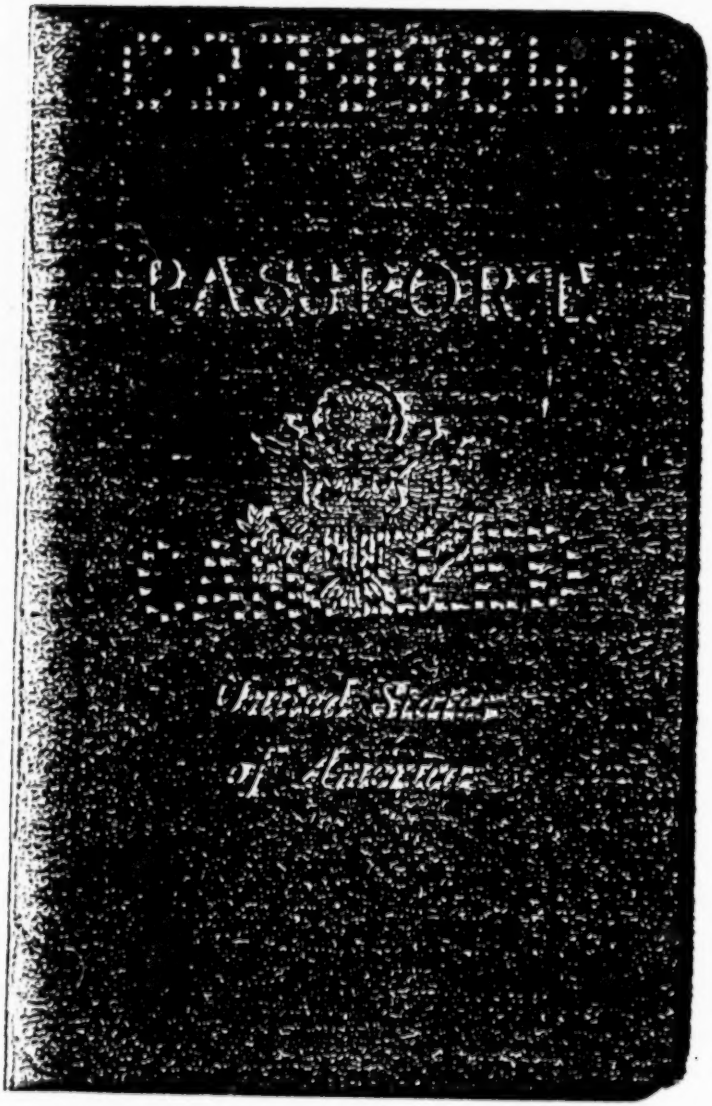
(c) At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) with respect to an exercise of authorities

under this title, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b).

Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625 (the "grandfather clause") provides:

Notwithstanding the amendment made by subsection (a) the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [Sept. 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

APPENDIX B


PASSPORT

I 480550

PASSPORT NUMBER

PEN AND INK ENTRY OF THE PASSPORT NUMBER BY THE BEARER

PLEASE FILL IN THE NAMES AND ADDRESSES BELOW.

BEARER'S ADDRESS IN THE UNITED STATES:

BEARER'S FOREIGN ADDRESS:

IN CASE OF DEATH OR ACCIDENT NOTIFY THE NEAREST AMERICAN DIPLOMATIC OR CONSULAR OFFICE AND:

Name

Address

IMPORTANT INFORMATION

This passport is the property of the United States Government and must be surrendered upon demand by an authorized representative of the Department of State. It is NOT VALID until signed BY THE BEARER on page two.

LOSS, THEFT OR DESTRUCTION OF PASSPORT. The loss, theft or destruction of a passport is a very serious matter and must be reported immediately to local police authorities and to the Passport Office, Department of State, Washington, D.C. 20524, or to the nearest American consular office. A new passport will be issued only after careful investigation which will entail considerable delay and may result in the issuance of a limited passport.

(CONTINUED ON LAST PAGE)

C2399841

The Secretary of State
of The
United States of America
hereby requests all whom it
may concern to permit the
citizen(s) of the United States
named herein to pass without
delay or hindrance and in
case of need to give said
citizen(s) all lawful aid and
protection

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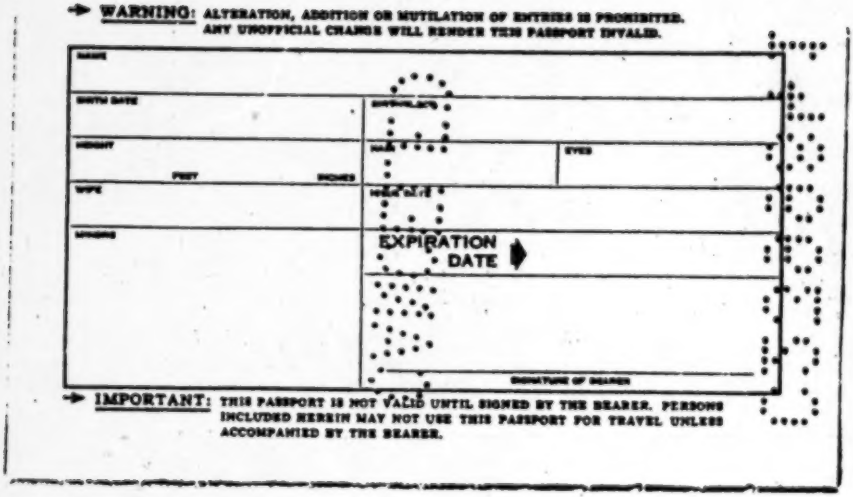
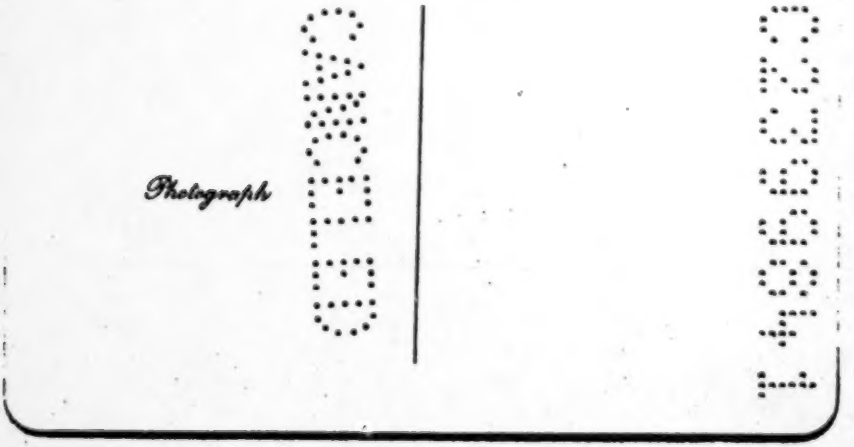

WARNING: ALTERATION, ADDITION OR MUTILATION OF ENTRIES IS PROHIBITED. ANY UNOFFICIAL CHANGE WILL RENDER THIS PASSPORT INVALID.
NAME
BIRTH DATE
HEIGHT
FEET
INCHES
TYPE
SPOUSE
NATIONALITY
SEX
EYES
REMARKS
EXPIRATION DATE
SIGNATURE OF BEARER
IMPORTANT: THIS PASSPORT IS NOT VALID UNTIL SIGNED BY THE BEARER. PERSONS INCLUDED HEREIN MAY NOT USE THIS PASSPORT FOR TRAVEL UNLESS ACCOMPANIED BY THE BEARER.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PASSPORT

Notice

U.S. courts have interpreted U.S. law in effect on the date this passport is issued as not restricting the travel of a U.S. citizen to any foreign country or area.

However, the use of a U.S. passport for travel into or through any of the following areas is authorized only when specifically validated for such travel by the Department of State:

CUBA

NORTH KOREA

NORTH VIET-NAM

You should consult a passport agency or an American consular office to determine whether any changes have been made in the above list.

This passport must not be used by any person other than the person to whom issued or in violation of the conditions or restrictions placed therein or in violation of the rules regulating the issuance of passports. Any willful violation of these laws and regulations will subject the offender to prosecution under Title 18, United States Code, Section 1544.

CANCELED

Amendments and Endorsements

CANCELED

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IMPORTANT INFORMATION

EXPIRATION. This passport is valid for five years unless expressly limited to a shorter period. The expiration date is given on page two.

NEW PASSPORT. This passport should be presented when applying for a new passport.

TRAVEL IN DISTURBED AREAS. If you travel in disturbed areas, you should keep in touch with the nearest American consular office.

PROLONGED RESIDENCE ABROAD. If you reside abroad for a prolonged period, you should register at the nearest American consular office.

LOSS OF NATIONALITY. You may lose your United States nationality by being naturalized in, or by taking an oath or making a declaration of allegiance to, a foreign state; or by serving in the armed forces or accepting employment under the government of a foreign state. For detailed information, consult the nearest American consular office.

WARNING TO DUAL NATIONALS. A person is considered a dual national when he owes allegiance to more than one country at the same time. A claim to allegiance may be based on facts of birth, marriage, parentage or naturalization. A dual national may, while in the jurisdiction of the other country which considers him its national, be subject to all of its laws, including military service. If difficulties occur, consult the nearest American consular office.

ALTERATION OR MUTILATION OF PASSPORT. This passport must not be altered or mutilated in any way. You must not alter any dates or make any changes in your description, on the photograph, or on any other page of this passport. Alteration may make it INVALID and, if willful, may subject you to prosecution (Title 18, U.S. Code, Section 1543). Only authorized officials of the United States or of foreign countries, in connection with official matters, may place stamps or make statements, notations or additions in this passport. However, you may amend or update information supplied by you on the inside of the front cover of this passport, if necessary.

GENERAL INFORMATION

IMMUNIZATIONS. The International Health Regulations adopted by the World Health Organization stipulate that vaccination against smallpox, cholera, and yellow fever may be required as a condition of entry to any country. For return to the United States, a Smallpox Certificate will be required only if, in the preceding 14 days, a traveler has visited a country reporting smallpox. Many countries require entering travelers to possess a valid International Certificate of Vaccination against Smallpox. In addition, some countries require travelers to possess valid Cholera and/or Yellow Fever Certificates. Details concerning recommended and required immunizations and prophylaxis, for travel to all areas of the world, may be obtained from your local or State health department.

HEALTH INSURANCE. Persons contemplating travel abroad should contact their medical insurance company to determine what coverage, if any, they have while outside the U.S. Generally Social Security Medicare does not cover health care expenses outside the U.S.

CUSTOMS SERVICE. Know before you go. The pamphlet "Customs Hints" gives the current customs information about Customs requirements, and how they apply to articles acquired abroad. Obtain a copy from your nearest customs office or from U.S. Customs, P.O. Box 7118, Washington, D.C. 20044.

TREASURY. Treasury regulations prohibit the unlicensed purchase or importation of merchandise of Cuban, North Korean, North Vietnamese and Rhodesian origin. For information, write to the Office of Foreign Assets Control, Treasury Department, Washington, D.C. 20220.

AGRICULTURE. Your country into the United States will be speeded if you bring with you NO foreign meat, other animal products, fruits, vegetables, plants, soil, or other agricultural items. It is unlawful to import foreign agricultural items without permission, since they may be the means of introducing destructive plant or animal pests and diseases. For specific information, write "Quarantines," U.S. Department of Agriculture, Hyattsville, Maryland 20782.

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No. 83-436

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-436

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The court of appeals held in this case that the President's authority under Section 5(b) of the TWEA to regulate economic transactions incident to travel to Cuba was not grandfathered in 1977. The bulk of respondents' brief is, however, devoted to different issues, ones not raised in our petition and not directly addressed by the court of appeals. They argue (Br. Part II)[1] that in fact TWEA Section 5(b) never encompassed the power to regulate travel-related transactions at all—that there was no such authority to be grandfathered. In a confusing sequence they precede that argument with the proposition (Br. Part I) that in any event the 1978 amendment to the Passport Act by implication comprehensively prohibits the exercise of any authority under the TWEA (or under IEEPA) to restrict travel-related expenditures, presumably repealing whatever such TWEA authority existed and was grandfathered.[2]

[1] Br. refers to respondents' brief in this Court.

[2] The sequence is confusing because the Passport Act argument (Part I of respondents' brief) is relevant only if their argument in Part II—that TWEA authority over travel-related transactions never existed—is rejected. The sequence adopted by respondents obscures the important point that the argument presented in Part

A central conceptual assumption dominates respondents' brief. That assumption is that the regulation of travel must, in the nature of things, be thought of as a unitary, single-track enterprise, presenting only a single question to be answered with one yes-or-no answer: May the Executive forbid travel? The answer to that question, say respondents, is to be found exclusively by examining the legislation governing the State Department's authority to restrict passports. Whatever answer that legislation provides then has overriding and preemptive force. If the answer is "yes," any regulation of economic transactions incident to travel is to be deemed ancillary, without independent legal significance. If the answer is "no"—if travel itself may not be prevented by refusing a passport—then all regulatory authority that may deter or restrict travel must, again in the nature of things, fall. The possibility that one statute may tell the Executive that it must issue a passport for travel to Cuba and —at the same time—another provide that the Executive may restrict the right to spend American dollars there, is simply not to be contemplated.

In fact this one-dimensional tidy universe need not exist and has never existed. International travel touches on a large variety of interests, so that regulations affecting such travel can and always have proceeded under different statutes on distinct regulatory tracks. Regulation pursuant to passport legislation is administered by the State Department; its purpose is to regulate travel as such; it can serve a variety of national security, foreign policy, and health and safety interests. Another track—formally, organizationally, and substantively distinct from passport controls—has been the regulation of economic transactions with foreign countries—including those incident to travel—during times of national emergency. The latter has always been authorized by separate legislation:

I, insofar as it has any bite at all, can prevail only if the 1978 Passport Act amendment is read to *repeal* authorities that *did* exist under Section 5(b) and *were* grandfathered in 1977.

To dispel this confusion, we discuss Part II of respondents' brief first; then we address Part I.

specifically, by Section 5(b) of the TWEA and more recently also by IEEPA; it is under the direct supervision of the Treasury Department. These tracks have coexisted as distinct regulatory enterprises because, although obviously related, they can raise independent policy issues.[3] There is, in sum, nothing impossible or illogical about a complex universe in which the question whether Americans should be denied a passport to travel to Cuba and the question whether Americans should be free to spend American dollars in Cuba are conceived of as different questions that do not necessarily and always have to have a congruent answer.

I.

In an effort to manufacture a simple one-track regulatory universe, respondents in Part II of their brief (Br. 21-31) seek to wipe TWEA from the scene. They put forward the argument (implicitly rejected by the court of appeals) that Section 5(b)—which authorizes regulation of "any * * * transactions involving, any property in which any foreign country or a national thereof has any interest"—has never been thought to confer authority to regulate transactions incident to "personal" travel.[4]

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[3] To give a parallel example, the aim of preventing the outflow of hard currency has frequently (*e.g.*, post-war Britain) led to the imposition of travel-related currency controls that can have a substantial impact on the ability to travel; but these regulations do not seek to prevent travel as such and are not in any way inconsistent with the issuance of a passport for travel.

[4] Respondents do not explain why the all-encompassing language of Section 5(b) excludes the regulation of travel-related transactions; that language is simply dismissed with the grudging concession (Br. 22 n.40) that it is "conceivable" that "personal" travel expenditures are covered by the statutory words.

Respondents (Br. 22) draw a distinction between "personal" travel expenditures and the "commercial intercourse" they identify as the subject of the TWEA. In fact, the TWEA legislative history respondents cite in support of this characterization does not relate to Section 5(b). (The latter was not included in the House version of the bill; its provisions authorizing the regulation and prohibition of transactions were not added until the conference committee stage. H.R. Rep. 155, 65th Cong., 1st Sess. 3-4, 10 (1917) (con-

They go so far as to add that "until the 1970s not a single public action by the executive branch or word uttered in Congress suggests that the TWEA could be used to regulate or prohibit personal travel expenditures" (Br. 24). These contentions cannot withstand scrutiny.

1. We start with the more recent period: namely, the crucial events of 1977, when—on respondents' own submission—the decision was supposedly made to remove "all restrictions on travel to Cuba" (Br. 4). Respondents' account of what happened in 1977 is remarkably evasive. Their brief (Br. 4, 7, 11-12) suggests that in 1977 President Carter simply held a news conference and removed passport restrictions, and that those events then somehow immediately merged into Congress's 1978 amendment to the Passport Act—the whole process adding up to a single simple national decision to eliminate any and all restrictions on and deterrents to travel to Cuba.

What, in fact, did President Carter do in 1977? He proceeded under two separate statutes. First, he instructed the State Department to remove area restrictions instituted under the Passport Act. Second, the President —acting through the Treasury Department—revised the assets control regulations promulgated under Section 5(b) of the TWEA by issuing limited general licenses authorizing most expenditures incident to travel (see Gov't Br. 8-9). The obvious understanding was that the pre-existing regulations issued under TWEA Section 5(b)

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ference report).) That history seems to relate primarily to Section 3 of the TWEA, which refers to "trade." Even that section has a broader scope than respondents suggest. The House report stated: "Citizens can not be permitted directly or indirectly to augment the material resources of the enemy by commercial intercourse. * * * * * The trade or commerce regulated or prohibited * * * covers almost every imaginable transaction, and is forbidden and made unlawful except when allowed under the form of licenses." H.R. Rep. 85, 65th Cong., 1st Sess. 2-3 (1917).

In any event, there is little substance in the distinction between "personal" and "commercial" transactions. Spending money abroad for an airline ticket or a hotel room is a commercial transaction, whether undertaken in connection with "personal" travel or business travel.

did in fact prohibit such expenditures. Removing passport restrictions did not automatically eliminate these prohibitions; independent action under TWEA was needed and was in fact taken. Moreover, the President clearly acted on the belief that these two regulatory regimes did not have to conform perfectly with each other. Passport restrictions on travel to Cuba were eliminated; but the 1977 TWEA regulations maintained several important restrictions on financial transactions incident to travel to Cuba. For example, transactions involving *scheduled* "flights or voyages to, from, and in Cuba" were not licensed by the general license (31 C.F.R. 515.560(a)(5) (1977)). Under respondents' reading of the TWEA, that restriction—surely a very significant deterrent to travel to Cuba—was presumably wholly illegal. Certainly its very existence disproves the claim that it was universally assumed that TWEA had nothing to do with "personal travel expenditures." [5]

2. The assumption that travel-related transactions are subject to independent regulation under Section 5(b) of the TWEA, quite apart from passport restrictions, rests on a long historical tradition.[6] Respondents themselves

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[5] The 1977 Treasury regulations also retained the prohibitions on purchase and bringing back to the United States of more than $100 worth of Cuban goods for personal use and on contracts between domestic credit card issuers and Cuban enterprises for issuance of credit to travelers. 31 C.F.R. 515.560(a)(3) and (a)(7) (1977).

[6] Respondents suggest (Br. 23) that the 1918 enactment of a statute authorizing the President to prohibit any United States citizen from departing or entering the United States without a valid passport is an early indication that Congress believed the TWEA did not authorize regulation of travel-related transactions. But that suggestion merely reflects respondents' erroneous assumption that regulation affecting travel has always proceeded under a preemptive one-track system. In fact the 1918 Congress was concerned primarily with controlling the movements (both into and out of the United States) of individuals thought to be German agents (including American citizens and neutral aliens, as well as enemy aliens)—a problem that could not have been readily solved by regulation under the TWEA. See, *e.g.*, H.R. Rep. 485, 65th

refer to the fact that in 1940 President Roosevelt, relying expressly on TWEA Section 5(b), issued Exec. Order No. 8389, 3 C.F.R. 645 (1940). That Executive Order initiated the first comprehensive Section 5(b) assets control program, prohibiting all unlicensed property transactions with respect to a long list of foreign countries involved in World War II.[7] Pursuant to that Executive Order, President Roosevelt in 1940 issued General License No. 33, authorizing remittances of up to $250 (later $500) per month to any United States citizen within any foreign country "for the necessary living and traveling expenses of the payee and his household." 6 Fed. Reg. 748 (1941); 5 Fed. Reg. 3634 (1940).[8] The meaning of this is clear. President Roosevelt obviously assumed just what President Carter assumed—that TWEA Section 5(b) author-

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Cong., 2d Sess. 2-3 (1918); Annual Report of the Attorney General of the United States 39-40 (1918).

Respondents refer to statements of government officials over the years that existing statutes provided no criminal penalties for violation of passport restrictions (Br. 28-29). But these statements mean only what they say: that violations of *passport* restrictions were not criminal. They neither say nor imply that violations of TWEA restrictions on financial transactions were not punishable if the transaction was incident to personal travel.

[7] Exec. Order No. 8389 was amended a number of times during 1940 and 1941. The amended version is reproduced as Exhibit G to our supplemental brief filed in the court of appeals.

[8] General License No. 33 was promulgated, not to encourage travel, as respondents imply (Br. 24 & n.43), but because many Americans had been stranded in invaded countries and needed financial assistance from friends and relatives in the United States. U.S. Treasury Dep't, *Discussion of Documents and Other Matters Pertaining to Foreign Funds Control* 192, 201 (1944). The general policy of the government was to encourage Americans to return to the United States (*id.* at 192, 219-220).

The amended version of General License No. 33 is reproduced as Exhibit H to our supplemental brief in the court of appeals. For the Court's convenience, we are lodging with the Clerk of the Court and providing to respondents' counsel a copy of relevant pages from the Treasury Department document referred to in the preceding paragraph.

ized him to determine, quite apart from passport regulations, whether and how far to permit expenditures incident to personal travel. His action prohibited such transactions in excess of $250 (later $500) a month (except pursuant to a specific license). Respondents provide no understandable account of the meaning of these events (see Br. 24 & n.43), which directly contradict their assertion that "[t]here was no use of the TWEA for travel transactions in World War II" (Br. 24). Respondents' legal argument clearly implies that President Roosevelt's action—like President Carter's 1977 action—was *ultra vires*. But it must be remembered that they support their legal argument entirely by the claim that no such authority was in fact ever asserted.[9]

3. Under the Cuban Assets Control Program regulation of travel-related transactions under the TWEA has been open and pervasive ever since its inception in 1963.[10] License files of the Office of Foreign Assets Control show that from 1963 through 1977 that office processed at least 900 applications for licenses to engage in travel-related transactions involving Cuba. Licenses were issued to government officials and other members of official delegations, attorneys,[11] media representatives, researchers,

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[9] Congress, too, clearly assumed in 1940 that a license would be necessary in order to make a transfer of funds in connection with travel to countries like Denmark or Norway (and even to countries not involved in the war, such as Argentina). See the somewhat jocular exchange on this subject between Senators Danaher and Connally at 86 Cong. Rec. 5179-5180 (1940) during the debate on the amendment and reenactment of Section 5(b).

[10] In 1950, comprehensive assets control programs were instituted with respect to North Korea and China. In connection with those programs, the Treasury Department made it clear (see page 11, *infra*) that licenses were required for property transactions incident to travel.

[11] For example, as early as 1963, respondents' lead counsel applied for and received f om the Treasury Department a license for "all transactions incidental to your personal travel to and from Cuba and personal maintenance while in Cuba as attorney for the Government of Cuba" (OFAC License No. C883, issued to Leonard B. Boudin, Aug. 6, 1963). See Exhibit B to our supplemental brief

individuals with seriously ill relatives in Cuba, representatives of religious groups, individuals participating in sports or cultural events, and individuals representing foreign-based subsidiaries of United States corporations. Each license stated that it was "[g]ranted under the authority of Section 620(a), Public Law 87-195, and under the authority of Section 5(b) of the Act of October 6, 1917, as amended."

Respondents characterize the Treasury's exercise of TWEA authority with respect to travel-related transactions as "ancillary"—apparently because the Treasury generally issued licenses for Cuban travel-related transactions only if the State Department had validated an individual's passport for travel to Cuba (Br. 12 & n.25). It is not clear what the term "ancillary" is meant to suggest here. There are obvious reasons of practicality and coherency in foreign policy for coordinating the issuance of licenses with the issuance of passports; that practice is irrelevant to the question whether independent TWEA authority did or did not exist. And we assume that respondents are not advocating the paradoxical proposition that the TWEA did authorize restrictions on travel-related transactions, but only during periods when *another* statute authorized the withholding of a passport.

4. There can be no doubt that Congress was aware of the Treasury's position that Section 5(b) authorizes regulation of travel-related transactions and its practice of requiring licenses for such transactions in the case of countries covered by assets control programs. As we noted in our opening brief (at 47 & n.43), there were references to such coverage at the 1977 subcommittee sessions during which the grandfather clause was debated.

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filed in the court of appeals. We have offered counsel for respondents the opportunity to inspect copies of the license applications and licenses we have located in OFAC files.

In addition to issuing licenses, the Treasury Department advised travel agencies, travel publications, corporations, and individuals that unlicensed expenditures in connection with travel to Cuba were illegal. We filed several examples of such correspondence in a submission to the court of appeals, dated December 30, 1982.

And in 1976 the Treasury Department gave a full account to Congress of its policy and of its actions to secure compliance with the prohibition on unlicensed travel-related transactions involving Cuba. Stanley Sommerfield, Acting Director of the Office of Foreign Assets Control, summed up the policy: "American citizens—businessmen and otherwise—are not legally allowed to go to Cuba and spend money there without a license." *United States-Cuba Trade Promotion: Hearing Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess. 45 (1976). Mr. Sommerfield described several specific steps the Office of Foreign Assets Control had taken to ensure compliance:

> To deal with this possibility [of TWEA violations], we are now requiring every American firm which applies for a subsidiary license to state whether any of its American citizens, officers or employees has visited Cuba since October, 1975. If so, they are required to describe the relationship between that Cuban visit and the contemplated subsidiary trade. If we find such a connection, we will deny the requested license. * * *
>
> We have also investigated one case of travel to Cuba by a "consultant," who was accompanied by executives of another firm (his clients). These Americans traveled as guests of the Cuban regime, and it appears that no commercial business was concluded. We are, however, still investigating the case.

Id. at 48; see also *id.* at 5-6 (testimony of O. L. Freeman), 10 (testimony of K. Jones). And, of course, those Members of Congress who traveled to Cuba or to other countries subject to an embargo knew from personal experience of the need to obtain a Treasury license for travel-related transactions.[12]

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[12] Our examination of OFAC files indicates that during 1974-1977 the Treasury issued 16 licenses (some covering more than one person) authorizing travel-related transactions in Cuba for members of Congress and their staff. Those who received such licenses

5. Respondents make much of the fact that the government has never initiated a prosecution under the TWEA for violation of a prohibition against travel-related expenditures (Br. 25-27). There are, of course, many reasons that may lead the government to decide not to prosecute a case of this sort—including lack of evidence that the traveler spent his own dollars in Cuba, or that the expenditures were made with the requisite specific intent. The magnitude of any violation also may play an important role.[13] In fact, there is little evidence to support respondents' claims (Br. 25-26 & n.47) of "widespread" evasions of restrictions on travel-related expenditures.

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included Representative Jonathan Bingham and R. Roger Majak, respectively Chairman and Staff Director of the subcommittee that drafted the grandfather clause.

Respondents contend (Br. 27) that passports issued during the 1960s and 1970s clearly implied that "travel expenditures [involving Cuba] were lawful." In fact, the sample passport reproduced as Appendix B to respondents' brief merely states (at 7570) that United States courts have interpreted United States law as "not restricting the travel of a U.S. citizen to any foreign country or area." The passport goes on to state that "the use of a U.S. passport" for travel to Cuba "is authorized only when specifically validated for such travel." Those who did obtain such validation were specifically advised by the State Department that "the Cuban Assets Control Regulations * * * prohibit all unlicensed transactions by Americans with Cuba or nationals thereof including payments for travel expenses, for accommodations, or for services." See 8 Foreign Affairs Manual § 249.92(c) (1966) (reproduced as Exhibit D to our supplemental brief in the court of appeals). See also Exhibit E to that brief (State Department handout to persons authorized to use United States passport for travel to Cuba during the 1960s). Thus, it was perfectly clear to all those who carried passports validated for travel to Cuba—including Members of Congress and their staffs—that the State and Treasury Departments took the position that unlicensed travel-related expenditures were prohibited by the TWEA regulations.

[13] Cf. *Haig* v. *Agee*, 453 U.S. 280, 303 (1981): "The Secretary has construed and applied his regulations consistently, and it would be anomalous to fault the Government because there were so few occasions to exercise the announced policy and practice."

Respondents attribute significance (Br. 25 & n.46) to the travel of three newsmen to China in the 1950s when that country was covered by a Section 5(b) assets control program. But respondents themselves acknowledge that the government considered prosecution of the newsmen under the TWEA.[14] And only a few months later the State Department issued a press release making it explicit that American news representatives wishing to travel to China were required to seek "licenses under the Trading with the Enemy Act" from the Treasury. See Department of State Press Release No. 473 (Aug. 22, 1957), *reprinted in Passport Legislation: Hearing on S. 806, et al. Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. 171 (1959).

6. The continuity of the understanding that the President has authority (independent of Passport Act authority) to regulate travel-related financial transactions is further illustrated by the recent history of regulations under IEEPA. For it must be remembered that in IEEPA Congress in 1977 gave the President, in connection with new national emergencies (and in language identical to TWEA Section 5(b)), authority to "regulate" or "prohibit" "any * * * transactions involving, any property in which any foreign country or a national thereof has any interest" (50 U.S.C. (Supp. V) 1702(a)(1)(B)). Respondents are noticeably quiet on the question whether this IEEPA language comprehends the power to regulate transactions incident to travel; but their argument with respect to the TWEA clearly requires the conclusion—rejected by the court of appeals, see Pet. App. 12a—that the regulation of such transactions was excluded from IEEPA as well. Again, how-

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[14] Respondents cite (Br. 21) a statement in Association of the Bar of the City of New York, *Freedom to Travel* 72 (1958), speculating that the decision not to prosecute the three newsmen was based on the conclusion of government officials that successful prosecution under the TWEA was not possible. No authority is cited for that statement. The cited newspaper article reporting the decision not to prosecute merely quotes a government official as stating, "[w]e do not want to see anyone boiled in oil." N.Y. Times, Feb. 21, 1957, at 13, col. 5.

ever, it is President Carter who acted directly on the opposite assumption. A few years after the passage of IEEPA (and after the 1978 amendment to the Passport Act) travel-related transactions involving Iran were prohibited in connection with the IEEPA embargo imposed on Iran in 1980. See 45 Fed. Reg. 26940 (1980) (codified at 31 C.F.R. 535.209 (1980)).

7. In sum, the history of regulation under both IEEPA and the TWEA—and, more specifically, the history of the Cuban Assets Control Regulations themselves—clearly compel a conclusion diametrically opposite to the one drawn by respondents. There has existed a long-standing and virtually unanimous understanding that TWEA Section 5(b) authorized the President to do exactly what the language of the statute says he may do in connection with a foreign assets embargo program: to regulate *all* property transactions, including those transactions incident to personal or business travel. This authority was not "ancillary" to or preempted by the regulation of passports by the State Department. It was an independent grant of authority that plainly validates the exercise of such power by a whole series of Presidents. And it is against this background that, we contend, Congress acted in 1977 when it grandfathered TWEA Section 5(b) "authorities" being exercised on July 1, 1977, and President Reagan acted in 1982 when he modified President Carter's 1977 general license and, in response to foreign policy needs, reimposed restrictions on the expenditure of American dollars by American tourists and business people traveling to Cuba.

II.

In Part I of their brief (at 10-20) respondents argue that in 1978 Congress, in amending the Passport Act, preempted all power—under either the TWEA or IEEPA [15]—to regulate financial transactions incident to

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[15] Respondents guardedly acknowledge (Br. 20 n.35) that their Passport Act argument applies to IEEPA as well as the TWEA.

We believe, further, that the court of appeals did necessarily reject respondents' Passport Act argument. The court of appeals

personal travel. The claim in effect is that in 1978 Congress impliedly repealed powers granted and exercised under a statute on the books since 1917 and carefully continued—in both the grandfather clause and in IEEPA—in 1977; it also requires the conclusion that Congress in 1978 was invalidating the standing 1977 regulations under which President Carter continued to prohibit certain travel-related transactions (such as those incident to any scheduled flight to Cuba).

Respondents can point to no language in the 1978 amendment or any legislative history to support the implausible claim that Congress intended to effect such a wholesale repeal. In fact their argument is based entirely on their conceptual assumption that the regulation of travel is necessarily a single-track enterprise. Respondents simply assume that a decision that a passport should be granted for travel to a specific area cannot, in the nature of things, coexist with a continuing authority in the President to limit or prohibit the spending of American dollars incident to such travel. In fact, as already explained, these two questions do not have to be considered as a single question and have traditionally been considered separately on the basis of distinct statutory tracks.

In this connection it is important to keep in mind that the 1978 Passport Act amendment and the President's grandfathered TWEA authority to regulate economic transactions incident to travel have entirely different structures and scope; there is no foundation for respondents' dark hints that the government's position is that, notwithstanding the 1978 statute, area restrictions on travel can be generally reimposed by the "backdoor" of the TWEA. The Passport Act amendment deals only with passports but applies to *all* countries; it imposes

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stated unequivocally that the President was free to regulate travel-related transactions in connection with a national emergency declared under IEEPA (Pet. App. 12a). That conclusion cannot, we believe, coexist with the proposition that, in 1978, Congress intended to repeal the Executive's authority to regulate such transactions under IEEPA *or* the grandfather clause.

limits on the President's power to bar travel directly by limiting the validity of passports in specific areas. The grandfather clause operates on an entirely different basis. It authorizes the continuation of regulations with respect to a broad category of economic transactions (of which travel-related transactions are only a small part); but it applies only to a tiny part of the world—the four countries for which comprehensive embargoes were in place on July 1, 1977. There is thus no substance to the suggestion that the grandfather clause (as read by the government) cannot coexist with the 1978 Passport Act amendment because it would allow the Executive to recreate the very regime of area restrictions Congress intended in 1978 to eliminate. The two statutes can coexist quite harmoniously. See *United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 578 (C.C.P.A. 1975). The Passport Act ensures on a world-wide basis that area passport restrictions can only be imposed under limited circumstances. At the same time, the President continues to have TWEA authority to prevent American citizens from transferring American currency to benefit the economy of those four countries with which—by hypothesis—our relations are so difficult and sensitive that a continuing comprehensive assets embargo has been judged to be in the national interest.[16]

III.

Respondents' contentions with respect to the grandfather clause (Br. 32-51) were generally anticipated in our principal brief and require only a short reply.[17]

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[16] The President would also continue to have authority to regulate travel-related transactions in connection with new embargoes imposed in connection with new national emergencies declared under IEEPA.

[17] Respondents say remarkably little about the statute's language (preserving "authorities" being exercised on July 1, 1977) or its structure. Instead, they continue their practice of rewording the statute to fit their own construction. Respondents have abandoned their previous references to grandfathering of "prohibitions" and "restrictions"; they now characterize the grandfather clause as

1. Respondents accuse us (Br. 46-47, 49-50) of advocating a construction of the grandfather clause that would give the President unlimited flexibility to exercise TWEA powers with respect to any country. That contention is frivolous. As we explained in our opening brief (at 38-52), the legislative history shows that Congress intended to grandfather broad Section 5(b) authority (including the authority to regulate travel-related transactions), but *only* for those countries for which there were comprehensive assets control programs in place on July 1, 1977—Cuba, Vietnam, Cambodia, and North Korea. It is true that certain narrow TWEA controls were in effect for other countries on July 1, 1977 (*e.g.*, an assets freeze for certain Eastern European countries and China, and a special set of rules (see 31 C.F.R. Pt. 505 (1977)) that prohibited the shipment of certain strategic items). But no one has ever suggested that these limited controls could serve as a springboard for the imposition of broad assets control programs for all of these countries. Our argument is simply that the grandfather clause should be construed to give meaning to Congress's intent that the President not be required to declare a new national emergency for the four countries that were subject to comprehensive embargoes in 1977.[18]

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preserving "specific existing regulations" (see Br. 9, 37, 38, 39, 40, 44). But the grandfather clause simply does not use these words.

Respondents criticize (Br. 49-50) our suggestion that, to the extent Congress may have intended to distinguish among classes of TWEA authorities, it thought in terms of the broad categories of currency controls, assets controls, and vesting. But respondents themselves propose a classification—economic transactions relating to travel as against all other economic transactions—without support in the statutory language or legislative history. In contrast, the categories we refer to appear on the face of Section 5(b) itself (as well as in IEEPA), and were distinguished at several points in the legislative history of the grandfather clause. See Gov't Br. 19, 46, 48 & n.44.

[18] Respondents note (Br. 48) that on July 1, 1977, there was a broad prohibition on unlicensed property transactions involving

2. Respondents suggest (Br. 47) that our argument that it is significant that the Cuban embargo (like other assets control programs) has continuously operated through a broad prohibition on unlicensed transactions accompanied by adjustable and revocable specific and general licenses implies that the coverage of the grandfather clause is dependent on "arbitrary drafting decisions." But there is not the slightest evidence that this traditional structure of regulation has ever led to manipulation or bureaucratic "contingent choices" (*ibid.*). In fact the choice whether to end an embargo entirely or merely to license transactions while leaving the overall embargo in place is not a drafting matter but a substantive policy choice. The former step is taken when relations with a country are normalized. As we explained in our opening brief (at 30-32), prior to that time, licensing is used in order to "fine tune" an embargo in response to foreign policy needs, without abrogating the underlying regulatory authority. Thus President Carter's 1977 decision to promulgate a revocable general license for travel-related transactions, qualified by specific restrictions, rather than to cut back on or end the underlying regulatory prohibition contained in 31 C.F.R. 515.201 (1977), was not an accident of draftsmanship;

China, accompanied by a general license permitting most such transactions, and assert that the Chinese assets control program, too, would be preserved under our reading of the grandfather clause. The legislative history is not clear on this point. Congress certainly intended to grandfather the freeze of Chinese assets until a satisfactory claims settlement agreement with China could be reached. See, *e.g.*, *Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 207 (1977). Congress may have contemplated that the President would have authority to narrow the general license if relations with China deteriorated after July 1, 1977. But the Executive has never attempted to exercise such an authority. The issue is in any case moot. As noted in our opening brief (at 31 n.29), a claims settlement agreement with China was reached, and the President ended the assets control program for China in 1980.

rather, it was a meaningful substantive choice to continue the exercise of regulatory authority.[19]

3. Respondents' discussion of the legislative history has one fundamental defect: lack of balance. Respondents urge (Br. 32-39) that Congress's single overriding purpose in 1977 was to cut back on the President's flexibility and to reallocate power from the Executive to Congress. In fact, as explained in our opening brief (at 38-42), Congress was moved by serious countervailing concerns. On the one hand, Congress wished to impose procedural limitations on the Executive's power to act on the basis of peacetime emergency powers and to increase the role of the legislative branch. On the other hand, Congress recognized that it would be virtually impossible to obtain agreement on legislation that would sweep within the new emergency powers scheme the existing assets control programs for Cuba, Vietnam, North Korea, and Cambodia, and that grandfathering of those programs was therefore necessary.[20]

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[19] Respondents demonstrate their fundamental misunderstanding of assets control programs when they state (Br. 47) that on July 1, 1977, United States citizens could make expenditures in connection with travel to Cuba "without permission from the United States government." The general license issued by President Carter in 1977 quite explicitly constituted a "permission" for such travel-related expenditures ("the following expenditures are authorized * * *").

[20] Respondents' own explanation of the purposes of the grandfather clause contradicts their construction of that provision. They acknowledge (Br. 37-38) that Congress enacted the grandfather clause in part to preserve diplomatic "bargaining chips" the President could use in negotiating with countries like Cuba. But a bargaining chip cannot be effective if all the President can do is to *eliminate* restrictions. Under respondents' construction of the grandfather clause, the President is limited to making an endless series of concessions.

Respondents' allegation (Br. 3, 38 n.68) that the grandfather clause was to be used to "phase out" existing TWEA programs is simply wrong. Several subcommittee members raised the possibility that the embargoes against Cuba and the other countries could be ended. Chairman Bingham responded that it would be impossible to accomplish that result in the legislation that included the grandfather clause and that termination of existing embargoes would

In their discussion of the legislative history respondents ignore the significance of the evolution of the statute, a process during which Congress and the Executive negotiated a compromise acceptable to both branches. They cite selective snippets, mostly from the early days of the subcommittee hearings, before subcommittee members came to appreciate fully the necessity of grandfathering the existing embargoes. Thus respondents place heavy reliance on Representative Bingham's statements at an early stage in the drafting process leading to the remark that, in his view, it seemed unnecessary to give the President authority to "expand what has already been done." *Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 167 (1977). In our opening brief (at 47-50) we took special care to set out the full context of Representative Bingham's statements (*id.* at 47-48 n.44). That exposition, which we will not repeat here, demonstrates that these remarks, when placed in the context of the legislative process as a whole, do not support respondents' crabbed construction of the grandfather clause—whether they are quoted once or repeated (as respondents do, see Br. 39, 41-42, 43, 46, 49) five times.

IV.

Respondents' argument that the Constitution invalidates the 1982 regulation restricting the expenditure of American funds by travelers to Cuba does not merit extended reply. Respondents' suggestion (Br. 54) that this regulation constitutes a *more* serious impediment to travel than the passport restrictions upheld in *Zemel* v. *Rusk*, 381 U.S. 1 (1965), and *Haig* v. *Agee*, 453 U.S. 280

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have to await separate legislation. He explained: "This is essentially an act trying to clear up the mess that the [TWEA] has left us in. We can always move on the front of Vietnam or Cuba * * *. However, to get this through in reasonably good form, we would like not to raise that particular controversy." *Hearings*, *supra*, note 18, at 210.

(1981), seem to us quite topsy turvy; as a practical matter travel without a valid passport is virtually impossible, whereas the TWEA regulation does not apply to hosted travel and also makes substantial provision for other important sorts of general and specific licenses. Beyond this, respondents' arguments add up to no more than disparagement of the significance of the foreign policy concerns with respect to Cuba that animated the 1982 regulation. Thus respondents suggest (Br. 55) that our relations with Cuba are marked only by " 'normal' tensions inherent in contemporary international affairs." With respect, we cannot accede to the suggestion that our relations with Cuba involve no more than " 'normal' tensions." But, in any event, respondents' efforts to second-guess the wisdom and effectiveness of the President's 1982 decision to tighten the general license for travel-related transactions with respect to Cuba have no place in this case. Whether the "national interest" justified President Carter's and President Reagan's annual determinations to keep alive the extraordinary Cuban assets embargo under the TWEA, and, more particularly, President Reagan's determination in 1982 to prohibit certain travel-related transactions under that embargo, is not a question for *de novo* redetermination either by respondents or the courts.[21] Congress in the TWEA and the

[21] Throughout their brief respondents continuously and flatly assert that the 1982 regulation imposed restrictions on travel-related transactions in Cuba even though no "national emergency" in our relations with Cuba in fact existed to justify those restrictions. (At one point (see Br. 32) they even assert, erroneously, that the government has conceded that no "emergency" justifies those regulations.) These claims are wholly misleading and muddled. They collapse two distinct questions into one. The first is: what are the *legal* predicates necessary for the imposition and continuation of the Cuban assets embargo? The second is: what in *fact* is the state of our relations with Cuba? The President, acting under the grandfather clause, has no legal obligation to find that a "national emergency" exists in order to continue an existing TWEA embargo; President Reagan therefore has continued the Cuban embargo without making such a finding, acting on the grandfather clause's statutory criterion of "the national interest of the United States." The fact that no "national emergency" finding was

grandfather clause specifically authorized the President to continue in place a comprehensive assets control program directed at Cuba (and not Israel or England or Italy, cf. Br. 55)—a country that for a quarter century has continuously engaged in activities seriously inimical to the interests of the United States. The President determined in 1982 that, in light of the then current developments, that program should include measures to prevent Americans from conferring substantial economic benefits on Cuba through the expenditure of tourist dollars in that country. That determination can hardly be characterized as arbitrary or irrational; its wisdom is not a proper subject of debate in this litigation.

CONCLUSION

For the foregoing reasons, and the reasons discussed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1984

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made in 1982 does not, therefore, have any probative force at all on the question whether, as a matter of *fact*, our relations with Cuba in 1982 (or since) have or have not reached an "emergency" state.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD REGAN,
Secretary of the Treasury, et al,

Petitioners

v.

RUTH WALD, et al,

Respondents.

On petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

BRIEF FOR NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE UNITED STATES, WASHINGTON OFFICE ON LATIN AMERICA, COUNCIL ON HEMISPHERIC AFFAIRS, AND THE SOCIETY OF AMERICAN LAW TEACHERS

AMICI CURIAE

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March 14, 1984

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INTERESTS OF AMICI CURIAE

THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA (NCC) is composed of 31 member denominations, Protestant, Episcopal and Orthodox, whose combined membership is over forty milliion persons.

The NCC includes among its expressed purposes "to study, speak, and act on conditions and issues in the nation and the world which involve moral, ethical, and spiritual issues inherent in the Christian gospel." Through its Division of Overseas Ministries, NCC maintains communication links with churches and councils throughout the world, including Cuba. Through its Human Rights Office, NCC investigates and expresses concerns about human rights violations.

WASHINGTON OFFICE ON LATIN AMERICA (WOLA) is a constituency based human rights

organization. It is a non-profit organization funded by 40 different religious organizations, foundation grants and personal contributions. It produces reports on Latin America, conducts public education functions, and facilitates exchanges between Latin Americans and citizens of the United States.

COUNCIL ON HEMISPHERIC AFFAIRS (COHA) is a non-profit organization specializing in research and education concerning Latin America. COHA's constituency is reflected in its Board of Directors, which consists of national presidents of trade unions, professional and academic organizations, as well as religious leaders and members of Congress. COHA publishes reports on press freedom and an annual report on human rights in Latin America, including Cuba. COHA sponsors education programs on Latin America and promotes interchanges between Latin and North Americans.

THE SOCIETY OF AMERICAN LAW TEACHERS (SALT) is a non-profit organization composed of approximately 600 law professors in law schools around the country. SALT supports the free exchange of people and ideas among all nations. SALT is particularly concerned that the regulations restricting travel to Cuba prevent teachers and students from the United States from participating in international meetings and from expanding their knowledge about Cuba in general and about Cuban laws and its legal system.

These organizations share the belief that travel to Latin America, including Cuba, is essential to their goals and purposes. Primarily concerned with educating and providing information, the amici curiae believe that prohibiting or limiting travel to Cuba seriously thwarts their objectives. There is no viable or adequate substitute for the knowledge that can be obtained only by

travelling to another country. The amici curiae also seek to promote better relations and understanding between the United States and the countries of Latin America and believe that travel furthers these interests. Indeed, it is the position of amici curiae that travel is essential to stability in the region.

SUMMARY OF ARGUMENT

I

This case involves a narrow question of statutory interpretation but raises fundamental questions of accountability of the Executive to Congress and the public. The decision of the Court of Appeals merely required the President to follow the procedural requirements of the International Emergency Economic Powers Act, 50 U.S.C. §1701 et seq. (IEEPA), and does not limit any authority the President may have to

promulgate such regulations if the procedures are met.

IEEPA's requirements of a declaration of national emergency before imposing new economic sanctions on foreign nations and a public explanation of the reasons for the sanctions are part of a series of statutes enacted by Congress in the aftermath of unilateral and often secretive activities of the Executive Branch during the Vietnam War. They are designed to involve Congress in the decisionmaking process and to permit public opinion to be heard on precipitous actions that may pose grave dangers to peace. The procedures required by IEEPA are particularly important in light of the limitations which the Constitution places on Congressional vetoes of Executive regulations, Immigration and Nationalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764 (1983) and because regulations

concerning a "military or foreign affairs function" are exempt from the notice and comment requirements of the Administrative Procedure Act.

The Government's concern about "rigidity" in the IEEPA procedures is properly addressed to Congress which imposed the requirements. As Justice Powell explained in a similar context, "[t]o be sure, the President may have preferred unrestricted power but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority." Id., 103 S. Ct. at 2796 (concurring opinion).

II

The travel-restricting regulations prevent most Americans from travelling to Cuba.[1] The exceptions for professional

[1] Counsel for Amici obtained 240 pages of documents from the Department of the Treasury pursuant to a Freedom of Information Act request for all opinions [cont'd. on next pg]

researchers is quite narrow; it is applicable only to Cuba specific research and to full time professionals. For example, among a wide range of professional conferences off-limits to United States scientists in 1983 were conferences on the drug Interferon and on sugar cane technology. The regulations also inhibit the activities of human rights groups which must have representatives conduct on the scene investigations and must meet with officials in foreign countries to express concern if human rights violations are found to exist. Further, the regulations inhibit the person-to-person relationships which contribute to the development of mutual understanding and the reduction of tensions between nations and their people.

The restrictions on travel are a direct

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and interpretations of the regulations. These documents are cited herein under the heading "FOIA Request."

result of the regulations restricting expenditures for travel. This Court has recognized that the exercise of fundamental rights may require the expenditure of funds. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976).

The almost total prohibition on travel imposed by the regulations unconstitutionally restricts travel. The prohibition was enacted under circumstances which the President has not seen fit to describe as a national emergency. Absent emergency conditions, the fundamental right to travel to a country cannot be almost totally denied simply as a means of influencing the policy of the government of that other country. To the extent that the regulations were designed to prevent a large flow of dollars to Cuba at a future date when and if Cuba were to develop extensive tourist facilities, the prohibition is premature and hence not the

least restrictive alternative available to the Government. There is ample time when a Cuban tourist industry becomes a reality for restricting travel; it is the flow of dollars to Cuba, not the construction of hotels, that the Government asserts is its interest in restricting travel.

ARGUMENT

I

THE PROCEDURAL REQUIREMENTS OF IEEPA ARE VITALLY NECESSARY TO INSURE ACCOUNTABILITY OF THE EXECUTIVE, THE OPPORTUNITY FOR CONGRESSIONAL INPUT AND THE EXPRESSION OF PUBLIC OPINION IN THE VOLATILE CIRCUMSTANCE OF IMPOSITION OF NEW ECONOMIC SANCTIONS ON OTHER COUNTRIES.

This case presents a narrow question of statutory interpretation, yet one which involves the most fundamental question of accountability of the Executive to the Congress and the public. The Court of Appeals merely held that the Treasury Department, in promulgating the travel restricting regulations, "concededly did not follow the 'consultative procedures' mandated by the 1977 International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 -- procedures aimed at focusing the attention of Congress as well as the President on the need

for the restrictions of the sort at issue here." 708 F. 2d at 795. The decision of the Court of Appeals itself does not inhibit the power of the President to promulgate the very same travel-restricting regulations so long as the President follows the procedures for public accountability of IEEPA. Whether the 1978 amendments to the Passport Act, Pub. L. 95-426, 22 U.S.C. § 211a, or the Constitution, prohibit such travel-restricting regulations are questions which this Court, in affirming, need decide only when, and if, the President chose to again promulgate them in accordance with IEEPA procedures.

The fundamental concern in this case is the ability of Congress to retain a role in foreign policy decision-making and to require the President to act in an open and publicly accountable manner when undertaking to engage in what is essentially economic warfare with

another nation. Ever since Marbury v. Madison, 1 Cranch 137 (1803), it has been the function of the federal courts to compel adherence to the law by officials of government and to invalidate acts of officials in excess of their lawful powers. That exercise of these historic powers of the federal courts is reflected in the decision of the Court of Appeals herein.

Except in wartime, IEEPA requires first that the President "in every possible instance, shall consult with the Congress before exercising any of the authorities" granted by IEEPA. 50 U.S.C.A. § 1703(a) (Supp. 1983). Before imposing economic sanctions, the President must declare a national emergency in response to an "unusual and extraordinary threat" to the national security, 50 U.S.C.A. § 1701 (Supp. 1983) and the authority exercised by the President must be limited to that specific national

emergency. Any new threat must be met by a new declaration of national emergency. Id. Once the President invokes sanctions, he must "immediately transmit" a report to Congress specifying (1) "the circumstances which necessitate such exercise of authority, (2) why the President believes those circumstances constitute an "unusual and extraordinary threat," (3) the authorities to be exercised, (4) "why the President believes such actions are necessary to deal with those circumstances" and (5) why such actions are taken with respect to a specific country. 50 U.S.C.A. § 1703(b) (Supp. 1983). Follow up reports to Congress are required every six months. 50 U.S.C.A. § 1703(c) (Supp. 1983).[2] Under IEEPA, Congress by concurrent

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[2] Presidents Carter and Reagan followed these procedures in connection with the Iranian hostage crisis, without any apparent difficulty. See Executive Orders No. 12170, 45 F.R. 65729 (Nov. 14, 1979), No. 12205, 45 F.R. 24099 (Apr. 7, 1980); No. 12211, 45 F.R. 26685 (Apr. 17, 1980); Nos. 12276-12284, 46 F.R. 7913 et. seq., (Jan. 19, 1981); No. [cont'd. on next pg]

resolution may terminate the state of emergency and the economic restrictions imposed by the President under it. 50 U.S.C.A. § 1706(b). But see Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764 (1983).

None of these procedures were followed by the President in the case of the Cuba travel-restricting regulations. There was neither prior consultation with Congress nor subsequent explanation of the justification as required by IEEPA. No separate national emergency was declared. Instead the Treasury Department simply published the regulations in the Federal Register, not even allowing for the usual advance notice and opportunity for comment provided in the Administrative Procedure Act, 5 U.S.C. § 553, apparently in reliance on the exclusion from the APA for "a

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12294, 46 F.R. 14111 (Feb. 24, 1981). See also Notice of President, 47 F.R. 50841 (Nov. 8, 1982).

military or foreign affairs function," Id. at § 553(a)(1).

The very exclusion of foreign affairs from the APA rule-making process increases the importance of the specific procedures of IEEPA designed to forestall possible precipitous action by the President without any opportunity for public discussion and Congressional input. IEEPA was one of a series of post-Vietnam statutes designed to curb unbridled exercise of asserted Presidential powers in foreign affairs. The Vietnam War involved a variety of secret actions undertaken by the United States government, including the bombing of Cambodia and domestic spying and break-ins. Other actions were taken by the President without prior consultation with Congress and without opportunity for public opinion to be heard, most tragically the invasion of Cambodia, which ultimately contributed to the coming to

power of the Pol Pot regime. Among the more important pieces of legislation by Congress in reaction to secretive or unilateral actions by the President were the War Powers Resolution, P.L. 93-148, 87 Stat. at 555 (1973), 50 U.S.C. §§ 1541-1548, the National Emergencies Act, P.L. 94-412, 90 Stat. 1255 (1976), 50 U.S.C. § 1601 et. seq., and IEEPA.

The need for a consultative process between Congress and the President is particularly compelling in light of the strained history between the United States and Cuba since the Cuban Revolution. Without consulting Congress, the President approved direct support to the invasion of Cuba by exiles at the Bay of Pigs. That abortive invasion was a factor in the development of the Cuban missile crisis which brought the world closer to nuclear war than at any other time. Later the CIA, in secret, enlisted the cooperation of the Mafia in attempts on the

life of Cuba's leader, Fidel Castro.[3] More recently, Cuba has charged that the United States is secretly responsible for dusting Cuban agricultural lands with harmful bacteria. New York Times, July 27, 1981, at 5. col. 1.

The President's deliberate failure to observe the requirements of IEEPA in promulgating the travel restricting regulations is another form of unilateral exercise of authority by the President, a particularly egregious one in light of the express provisions of IEEPA restricting the President's authority in the area of economic sanctions. Congress provided that economic sanctions may only be imposed when another country's actions are an "unusual and

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[3] Alleged Assassination Plots Involving Foreign Leaders: An Interim Report of the Select Committee to Study Governmental Operations with Respect to Intelligece Activities, S. Rep. No. 465, 94th Cong., 1st Sess. at 71 (1975).

extraordinary" threat to the national security and the President so declares. The argument of the Government that such a requirement "introduce[s] a dangerous and unnecessary rigidity into the conduct of our foreign policy" is one which should be addressed to Congress and not this Court, for it is Congress which imposed the national emergency requirement. As Justice Powell explained in a very similar context, "[t]o be sure, the President may have preferred unrestricted power but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority." Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764, 2796 (concurring opinion).

The Government does not dispute the fact that the President is bound by the requirements of IEEPA as to every country in

the world except Cuba, North Korea, Vietnam and Cambodia, the four countries as to which certain sanctions under the Trading with the Enemy Act were in effect when IEEPA was enacted. It offers no reason to support the nation that Congress intended to give the President greater flexibility in dealing with those four countries than with all the other countries of the world or why such additional flexibility was needed for those four countries. The Court of Appeals quite correctly concluded that "Congress intended the savings clause [50 U.S.C. § 1706(b)] to be narrowly interpreted to continue in effect only those restrictions actually exercised in July 1977. It did not want the existence of one sort of TWEA restriction in 1977 to serve as a justification for imposing a new one. In fact, it did not want the President to be able to use the old Act as statutory authority for anything new." 708 F. 2d at

798.

Indeed, the wish of the Government for unfettered authority with respect to new economic sanctions against Cuba is precisely what Congress sought to curb. The plain language of IEEPA demonstrates that Congress withdrew from the President the "flexibility" to impose new economic sanctions, restricting such action to the drastic situation where an "unusual and extraordinary" threat to the national security exists.

If the President believes such a threat is presented by Cuba he is free to declare a national emergency and impose any new sanctions within his power. But the President has not chosen to so declare. It borders on the bizarre for the Government to assert that the declaration of a national emergency as to Cuba might "significantly heighten tensions" between our country and Cuba in light of the history of the relations

of the past twenty-five years and their current status. The United States has not had formal diplomatic relations with Cuba for more than twenty years, has imposed an almost total economic embargo (except for travel) for over twenty years, has supported an invasion of Cuba and attempts to kill its leader. Recently, the Administration has dubbed Cuba as an agent of the Soviet Union and regularly, as in its brief herein, accuses Cuba of attempting to subvert and destabilize governments in Central America and the Caribbean. In these circumstances, the declaration of a national emergency (if one actually existed) would hardly make things worse.

The limitations which the Constitution places on the power of Congress to veto regulations renders more important than ever adherence by the Executive Branch to specific procedural requirements which must be

followed in promulgation of regulations. As Justice Powell noted, "the legislative veto is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies and preserves Congress' control over lawmaking." Immigration and Naturalization Service v. Chadha, supra, 103 S. Ct. at 2395. Since Congress may be unable to veto regulations such as those at issue herein, adherence to the requirements of IEEPA as to declaration of a national emergency and reporting to Congress are unusually important, particularly when the results of unilateral actions by the executive may ultimately lead to hostilities without the opportunity for Congress to exercise its powers unders its constitutional authority to declare war. "Oversight

hearings and Congressional investigations have their purpose, but unless Congress is to be rendered a think tank or debating society, they are no substitute for the exercise of actual authority." Id., 103 S. Ct. at 2795, n. 10.

This Court emphasized in its decision in Chadha, that "[t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays encountered in complying with explicit Constitutional standards may be avoided, either by Congress or the President. With all the obvious flaws of delays, untidiness and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." Id., 103 S. Ct. at 2788.

What is true as to adherence to the

Constitution is equally true of adherence by all branches of Government to validly enacted laws. The Executive, in this case, has chosen to disregard the law.

II

THE REGULATIONS PROHIBITING EXPENDITURE OF FUNDS FOR TRAVEL TO CUBA EFFECTIVELY PREVENTS MOST CITIZENS OF THE UNITED STATES FROM TRAVELLING TO CUBA. ABSENT UNUSUAL AND EMERGENT CIRCUMSTANCES, SUCH A SWEEPING RESTRAINT ON TRAVEL VIOLATES THE FUNDAMENTAL RIGHT TO TRAVEL PROTECTED BY THE CONSTITUTION.

A. The Travel-Restricting Regulations Prevent Most Americans from Travelling to Cuba

The travel-restricting regulations adopted in 1982 prohibit the expenditure of any funds by United States citizens and others subject to the authority of the United States for travel to Cuba, with very limited exceptions. A general license is granted to (1) officials of the United States Government, a foreign government or

intergovernmental organizations but only on official business; (2) to journalists and professional researchers, and (3) persons visiting close relatives in Cuba. 31 C.F.R. § 515.560(a)(1). Even these exceptions are very limited. A member of Congress, or a federal judge, could not travel to Cuba to deliver a speech or to learn about Cuba's domestic situation or foreign policy unless on official business. State officials are totally outside the general license provision.

The definition of "professional research" is particularly narrow. 31 C.F.R. § 515.560(h). To qualify, one must not only be a "full-time professional" (undefined) but the research must be specifically related to Cuba, and there must be "a substantial likelihood of dissemination of the product of such research." A law teacher who desires to travel to Cuba to study its legal system or

particular aspects of Cuban law to provide comparative background for his or her teaching seemingly could not do so absent a likelihood of publication, see 31 CFR. §515.560 (h)(1), unless classroom lectures were considered "dissemination" of the product of research.[4]

Even those qualifying as professional researchers and meeting the "likelihood of dissemination" requirements are limited in their right to travel to Cuba. Travel is authorized only for research "specifically related to Cuba." Id. In addition, a "professional researcher" could not be accompanied by research assistants unless the assistants themselves are professional researchers or graduate students "working to

[4] The Treasury Department has ruled that "[g]eneral interest study tours, even when the prospective participants are professionals in various fields, do not constitute 'engaging in professional research.'" FOIA Request-Letter to Senator Glenn (Jan. 14, 1983).

qualify themselves academically as professionals." 31 C.F.R. § 515.560(h)(2) and (4). "Study visits to Cuba in connection with pre-college or undergraduate college course work are not within the scope of professional research and similar activities authorized by the general license." Id. Amici's FOIA request revealed that the Treasury Department has ruled that requests for study tours of Cuba as part of undergraduate courses or seminars at the University of Wisconsin, California State College at Stanislaus, the Abington Friends School, the Germantown Friends School and the Higher Education Consortium for Urban Affairs did not qualify for a general license and that it was against administration policy to grant special licenses for such purposes.[5]

[5] FOIA Request-Letters from the Treasury Department to Dr. Joel P. Lazinger (Aug. 13, 1982), to Professor Gary Shaw (June 15, 1983), to Senator Arlen Spector (September 14, 1982), and to Senator David Durenberger (Dec. 10, 1982).

In addition, the United Presbyterian Church and the Lutheran Church were both denied either a general or special license for study tours to Cuba by church youth groups.[6]

B. The Travel Restricting Regulations Prevent Scholars from Attending or Speaking at International Conferences on Scientific and other Academic Subjects

Because the travel-restricting regulations prevent attendance at a variety of international conferences, scholars from the United States are deprived of the opportunity to learn and exchange information and ideas merely because a conference occurs in Cuba. "Specific license requests pertaining to travel for attendance at professional meetings to be held after December 31, 1982, will generally be denied." 31 C.F.R. § 515.560(i). For

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[6] FOIA Request-Letters to Senator Cranston (July 9, 1982) and Senator Glenn (January 14, 1983).

example, in 1983, United States physicians and pharmacological researchers could not attend an international conferece on the important new drug Interferon because the conference was not "Cuba-specific." American Medical Association News, p. 66 (May 6, 1983).

Conferences in 1983 on sugar cane technology sponsored by the Congress of the International Society of Sugar Cane Technologists and by the Group of Latin-American and Carribean Sugar Exporting Countries were also off limits to American scholars because the subject matter was not Cuba specific. A United States scholar could not even present a paper at the conference since the subject is not Cuba specific.[7]

The range of interference in the scholarly and intellectual affairs of

[7] FOIA Request-Letter from Treasury Department to Rafael Pou (November 15, 1982).

citizens is illustrated by the range of international conferences which were off-limits due to the travel-restricting regulations. In 1983, these conferences included tropical diseases, health psychology, Latin American culture and mass communication, sports medicine, epidemology and the prevention of cardiovascular illness, pathology, architecture, geology and international broadcasting. (Source: Cuba Tourist News, 1983, published periodically). Those who did not qualify as "professional researchers" were denied the opportunity to attend a conference on primary health care in Cuba sponsored by the World Health Organization and the Pan-American Health Organization. The Cuban primary health care system has been suggested as a model for developing countries. An article in the New England Journal of Medicine, December 8, 1983, at 1468, notes that even

Cuba's detractors admit that the new government has made good on its "commitment to provide Cubans with medical care equal to any in the world" and speaks of "dramatic reversals in Cuban medical care that have been widely and prominently published in scholarly periodicals outside Cuba. In the United States, much of this news has been received with skepticism, or worse, has been ignored." Id. at 1472.

The scope of lost opportunities for United States citizens will be equally broad in 1984. In the health field alone, conferences in Cuba will be held on pediatrics, reconstructive surgery, anesthesiology, gynecology and obstetrics, dental prosthesis, cancer and radiation therapy, nursing care, oral surgery, health psychology, gastroenterology, proctology, health administration, hygiene and epidemilogy, and internal medicine and

cardiology. Cuba Tourist News (1984).

Victor Weisskopf, then Vice-Chairman of the Federation of American Scientists, emphasized the importance to scholars of personal exchanges and international contacts:

> It is obvious to anyone who knows scientific life that the personal exchange of ideas is a most important way of productive work. The mere reading of foreign literature can never replace the personal give and take ... International exchange of ideas and discussion is indispensable because details of scientific research are never written down in the actual publications. Frequently, only conversation can reveal a special technique or a special instrumental design which foreign scientists have used to make their experiments work. Only their presence can help our own scientists to put these experiments into use for discoveries for the development of our program. Hearings, Presidential Commission on Immigration and Naturalization, 82 Cong., 2d Sess. (1952) at 408.

C. The Travel-Restricting Regulations Retard the Activities of Human Rights Organizations in Reference to Cuba.

It is essential to the ability of organizations concerned with human rights that their representatives be able to travel without governmental permission to any country. Human rights groups such as amici WOLA and COHA send representatives to a variety of countries for several purposes including: (1) to investigate the status of respect for human rights and (2) to meet with govermental representatives to express concerns about alleged human rights violations. Despite the general reluctance of the Cuban government to receive human rights delegations from abroad, substantial information concerning the human rights situation in Cuba has been collected and disseminated, in part through the visits of representatives of human rights organizations. For example, Amicus COHA publishes annual reports on the human rights situation and press freedom in countries in

the Western Hemisphere, including Cuba. Amnesty Interational published a major study of the human rights situation in Cuba in November 1978 entitled "Memorandum Submitted to the Government of the Republic of Cuba" and publishes updates in its Annual Reports.

It is possible, but by no means certain, that some representatives of human rights organizations would be granted special licenses to travel to Cuba under 31 C.F.R. §515.560(b) authorizing special licenses "in appropriate cases to persons desiring to travel to Cuba for humanitarian reasons." But the very necessity to obtain the special license undermines the effectiveness of the work of the human rights organization and the credibility of the information gathered and disseminated. Human rights groups cannot appear to be acting under the imprimatur of any government. A special license granted "in appropriate cases" is the very sort of

governmental approval human rights groups must avoid.

The operation of Amnesty International, the largest membership-based human rights group, illustrates the need for independence of goverment in human rights activities. Amnesty International requires its local membership group to adopt a "prisoner of conscience" in each of three international sectors -- Western capitalist nations, Communist nations and Third World nations.

When fundamental rights, such as the right to travel are involved, this Court has refused to sanction the power of government to license their exercise. In Thomas v. Collins, 323 U.S. 516, 540 (1945), this Court held that "a requirement that one must register before he undertakes to make a published speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

See also Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943) ("a state may not impose a charge [a license tax] for the enjoyment of a right granted by the Federal Constitution.") In Cantwell v. Connecticut, 310 U.S. 296 (1940), this Court struck down a city licensing statute as applied to a religious group soliciting funds, stating that "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." Id. at 307. Accord: Lovell v. Griffin, 303 U.S. 444 (1938). The special licensing provision in the travel-restricting regulations, with its vague, discretionary standard of "in appropriate cases," also represents a similar, unbounded licensing restriction on

the fundamental right to travel.[8]

D. The Travel-Restricting Regulations Burden the Development of Mutual Understanding Between Cuban and United States' Citizens Necessary to Reduce Tensions Between the Goverments and to the Maintenance of Peace in the Hemisphere.

Pope John XXIII, in the Papal Encyclical, Pacem in Terris, said:

> There is reason to hope, however, that by meeting and negotiating, men may come to discover better the bonds that unite them together, deriving from the human nature which they have in common; and that they may also come to discover that one of the most profound requirements of their common nature is this: that between them and their respective peoples it is not fear which should reign but love, a love which tends to express itself in a collaboration that is loyal, manifold in form and productive of many benefits ... From the fact that human beings are by nature social, there arises the right of assembly and association.

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[8] The authority for special licenses is itself limited to persons desiring to go to Cuba for humanitarian reasons or for purposes of public performances, public exhibitions, or similar activities. 31 C.F.R. § 515.560(b). Special licenses are not available to other travellers, even to those wishing to attend international conferences. 31 C.F.R. § 515.560(i).

Quoted in Zemel v. Rusk, 381 U.S. 1, 24-25 (1965).

President Eisenhower, speaking at the Heads of Government Meeting in Geneva, exhorted the members "[t]o lower the barriers which now impede the opportunities of people to travel anywhere in the world for peaceful, friendly purposes, so that all will have a chance to know each other face to face." 33 Dep't. St. Bull. 174, 175. Secretary of State Dulles said:

> No better formula for arousing mutual interest and creating mutual understanding has been found than physical and spiritual contact among the peoples of the world. It makes little difference whether international travel is motivated by business, cultural, scientific, or purely recreational interests. The fact is that the international contact resulting from such travel, in each instance, dispels prejudices and narrows the gulf between people of different nationalities. 38 Dep't. St. Bull. 689 (1958).

Recently, the president of Columbia University, Michael Sovern, seeking to surmount what he termed a direct link in the

United States between "lack of knowledge and lack of diplomatic success" proposed that a federally financed National Endowment for International Studies be created. Professor Sovern said that additional activities in schools and colleges not necessarily part of the new endowment ought to be more vigorously supported, including student exchange programs. Mr. Sovern also said that:

> The conduct of a democracy's foreign policy is too profoundly influenced by domestic politics for us to settle for training specialists ... We must have a well-informed citizenry ... How can we guard against the illusionary and the irrational in American foreign policy -- a failing that has plagued administrations of both parties? The answer ... is knowledge, by which I mean more knowledge, deeper understanding, a willingness to face complexity rather than hide behind rhetorical shields, an ability to analyse information dispassionately ... an informed insight into the heritage and value system of cultures far different than our own. N.Y. Times, Jan. 25, 1984, at B1., col. 1-4.

Perhaps there is no historical material

more relevant to the advisability of permitting travel to Cuba than this nation's turnaround in its troubled relationship with China. After the Chinese Communist Revolution in 1949, the United States almost cut off all contact with China for almost twenty years. The prevailing view in the United States was that Communist nations are monolithic and therefore should all be treated equally as enemies. We now know how inaccurate this view actually was. China developed into a major antagonist of the Soviet Union, and the two countries have tied up a substantial portion of their military resources along their mutual border. These antagonisms began to evolve quite early in the history of Communist China, but their recognition in the United States was long delayed due in part to the self-imposed isolation of the United States from China. However, beginning in 1968, even with the

Vietnam War raging and China the principal supporter of North Vietnam, successive administrations realized the advantage to opening the doors to communication and exchange at both governmental and person-to-person levels.

Eugene Rostow, then Undersecretary for Political Affairs, said in 1968:

> We would see an end to this isolationist, exclusivist attitude in Asia .... We have made clear our willingness to welcome Chinese scientists, scholars and journalists to the United States and have encouraged our own academics to establish contact with their counterparts on the mainland of China. To facilitate these contacts we have eased restrictions on travel to Communist China ... It is our hope ... that one day the barriers which the Chinese have guarded with such fierce determination will begin to crumble on their side, just as we have ourselves pushed aside barriers which once existed in our policy. 48 Dep't. St. Bull. 741, 747 (emphasis added).

The change in policy marked by Rostow eventually led to President Nixon's historic trip to China. On his return the President

said:

> As we succeed in reducing the danger of war, ... we must also work at enhancing the quality of peace. One of the best ways of doing this is through people-to-people contacts -- contacts aimed at reducing the fear and the ignorance which have divided mankind down through the ages and at fostering habits of trust and patterns of cooperation. That was one of the major purposes of the visits Mrs. Nixon and I made to the People's Republic of China and to the Soviet Union ... [N]ations, like individuals, stand a better chance of working constructively together if people on both sides can learn to respect one another as fellow human beings. 67 Dep't. St. Bull. 134 (1972).

The concept of free international travel and the recognition of travel as a fundamental human right was embodied in the Final Act of the Conference on Security and Cooperation in Europe (the Helsinki Agreement) 73 Dep't. State Bull. 323 (1975), which President Ford signed on behalf of the United States. That agreement, stated that the participating States consider the development of human contacts "to be an

important element in the strengthening of friendly relations and trust among peoples" and would "[m]ake it their aim to facilitate freer movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating states." Id. at 339.

When President Carter removed restrictions on travel to Cuba, he expressly equated his action with a commitment to fundamental human rights, 76 Dep't. St. Bull. 332 (1977) and to our obligation under the Helsinki Agreement, stating:

> I have long been concerned about our own nation's stance in prohibiting American citizens to travel to foreign countries. We also are quite eagerly assessing our own nation's policies that violate human rights as defined by the Helsinki Agreement. Later on this year we'll go to Belgrade to assess the component parts of the Helsinki Agreement. And I want to be sure that we don't violate those rights. So I've instructed the Secretary of State to remove any

> travel restrictions on American citizens who want to go to Vietnam, to North Korea, to Cuba and to Cambodia. 76 Dep't. St. Bull. 305 (1977).

One year later, Congress codified the spirit of the Helsinki Agreement when it amended the Passport Act "[f]or the purpose of achieving greater United States compliance with the provisions of the final Act of the Conference on Security and Cooperation," Pub. L. 95-426, § 124, 92 Stat. 971, 22 U.S.C. § 211a (1978).

The Government's contention that the regulation at issue does not regulate travel but is addressed "entirely to economic transactions," is not without irony in the wake of the Helsinki Agreement. Our government was highly critical of European Communist nations advancing the excuse of lack of hard currency to justify the prevention of their citizens from travelling internationally. See, e.g. N.Y. Times, Dec.

17, 1972, at 12, col. 3, where it was reported that in preparation for the Helsinki Conference, Western diplomats "scoff" at the argument of Communist countries that they do not have enough hard currency to permit unrestricted travel, "saying Communist reluctance to open travel and cultural gates is based more on ideology than economics ... [Even] if Western Governments provided advantageous exchange rates, or private organizations offered special funds, to promote travel ... a Polish ideologist conceded that such a proposal would create 'tensions' at home."

E. The Prohibition on Travel Expenditures Directly Interferes with Travel to Cuba

It is so apparent that travel requires expenditure of money that the Government's argument that the regulations are only "incidental" burdens seems difficult to

understand. The facial inaccuracy of the government's argument is clear from the decisions of this Court recognizing that expenditure of money is necessary for the exercise of constitutionally protected rights. In Buckley v. Valeo, 424 U.S. 1 (1976), this Court held that a restriction on the amount of money an individual may spend in a political campaign violates the First Amendment. "This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." Id. at 19. The Court also recognized that "[p]acing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 299 (1981). Further, the Court has recognized in a long line of cases the relationship between the solicitation of funds and the exercise of Constitutional rights. In 1940, Cantwell v.

Connecticut, 310 U.S. 296 (1940) struck down an ordinance requiring a license for solicitation of funds by a religious organization. Murdoch v. Pennsylvania, 319 U.S. 105 (1943), struck down a license tax on soliciting funds for religious purposes, the Court stating that "[i]t is plain that a religious organization needs funds to remain a going concern ... Freedom of speech, freedom of the press, freedom of religion, are available to all, not merely to those who can pay their own way." Id. at 111. See also Martin v. Struthers, 319 U.S. 141, 146 (1943), Grosjean v. America Press Company, 297 U.S. 233 (1936). More recently, this Court noted that "soliciting funds involves interests protected by the First Amendment's guaranty of freedom of speech." Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 629 (1980). The opinion made clear that "[o]ur cases long

have protected speech even though it is in the form of ... a solicitation to pay or contribute money," id. at 633, citing New York Times Company v. Sullivan, 376 U.S. 254 (1964) involving application of the First Amendment to solicitation of contributions by newspaper advertising, and Bates v. State Bar of Arizona, 433 U.S. 350 (1977), involving commercial solicitation.

The interference with travel is greater here than in most of the cited First Amendment cases. For most Americans, the prohibition on travel expenditures to Cuba is total. In contrast, Buckley involved Presidential elections in which millions of dollars of government campaign subsidies are available, substantial contributions are permitted and alternative means of communication, such as door-to-door canvassing and grass roots organizing are available. There is no alternative for a

traveller who cannot purchase his or her daily needs. That "hosted" travel (paid for in Cuba) is a possibility for a handful of Americans does not excuse the interference with travel for most of our people. The Constitution protects the right to spend one's own resources in the exercise of fundamental rights, Buckley v. Valeo, supra, and does not permit the Government to restrict such rights to cases where a foreign nation, or its people, are willing to extend charity to citizens of the United States.

F. The Travel-Restricting Regulations Unconstitutionally Interfere with Travel by American Citizens

Beginning with Kent v. Dulles, 357 U.S. 116 (1958), this Court has repeatedly recognized that international travel is a constitutional right protected by the Fifth Amendment. See Haig v. Agee, 453 U.S. 280 (1981). Moreover, the Court in Kent

emphasized the concepts developed by Professor Zechariah Chaffee linking the freedom of travel with First Amendment values, particularly the "right to know." Kent stated that the right to travel rests in part on the contribution to citizenship by enabling Americans "to be well-informed on public issues thus making sounder decisions at home because a well travelled citizen is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers." Id. at 126-27, quoting from Z. Chaffee, Three Human Rights in the Constitution of 1787 195-96 (1956).[9] The right to know has been

[9] Senator Sam Ervin has written that "When the people do not know what their government is doing, those who govern are not accountable for their actions — and accountability is basic to the democratic system. By using devices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion." Secrecy in a Free Society, 213 The Nation 454, 456 (1971).

recognized as an integral part of free expression. As summarized in Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748, 756-57 (1976):

> Freedom of speech presupposes a willing speaker. But where a speaker exists ... the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In Lamont v. Postmaster General ... the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in Kleindienst v. Mandel ..., we acknowledged that this Court has referred to a First Amendment right to "receive information and ideas," and that freedom of speech "necessarily protects the right to receive." And in Procunier v. Martinez ... where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the mail was addressed. There are numerous other expressions to the same effect in the Court's decisions.

Any restriction on right to travel thus must be subject to heightened judicial

scrutiny, measuring "the extent of governmental restriction imposed [and the] extent of the necessity for the restriction." Zemel v. Rusk, 381 U.S. 1, 14 (1965). The extent of the restriction here is extremely wide, as discussed above. The governmental interests asserted here do not outweigh the fundamental values inherent in the right to travel. Basically, the government contends that it is free to impose travel restrictions to influence the policies of other nations which the Government considers hostile to the interests of the United States. And the Government asserts it may do so even absent a situation involving a national emergency, for the President did not declare a national emergency as the basis for the travel-restricting regulation. Such a raw assertion of Executive power over a fundamental right undermines the very notion of constitutional protections afforded such

rights.

The difference in circumstances herein and those prevalent in the two cases in which this Court upheld travel restrictions are marked. Zemel v. Rusk, supra, involved passport restrictions on travel to Cuba in the aftermath of the Cuban missile crisis which brought the nation to the edge of war. Haig v. Agee, supra, involved a travel restriction imposed on a single individual who was a former CIA official and who, the government asserted, was engaged in travel for the purpose of exposing other agents to possible reprisals, including assassination.

Finally, the Government argues that the travel-restricting regulations are necessary to limit the flow of hard currency to Cuba, and particularly to discourage the development of a Cuban tourist industry that would attract many Americans. Yet the amounts of money presently affected by the

regulation are small, only eight million dollars in the year preceding its promulgation (J. 19), hardly an amount justifying a ban on travel for almost all Americans. Furthermore, the Government continues to permit several hundred million dollars of hard currency to flow to Cuba each year from foreign subsidiaries of American corporations. Id.

The timing of the travel restrictions is also contrary to constitutional considerations, particularly the requirement that any restrictions on fundamental rights be imposed in a manner least restrictive of those rights. Restricting expenditures for travel at a time when the dollar volume to Cuba is so low is not the least restrictive alternative. Whether Cuba actually will develop such a tourist industry is a matter of speculation not warranting interference with travel at this time. There is time

enough when and if the Cuban tourist industry becomes a reality to restrict expenditures, assuming the President has the statutory and constitutional authority to do so then. It is, after all, the tourist dollars that the Government is concerned with, not the construction of hotels in Cuba.

The premature quality of the regulations also violates the First Amendment principles embodied in the fundamental right to travel. Speech cannot be punished or prohibited except where there exists a "clear and present" or "imminent" danger of a substantive evil which the Government may suppress. Brandenburg v. Ohio, 395 U.S. 444 (1969). The "substantive evil" of a large flow of dollars is not imminent or even present foreseeable. It is far too early to restrict the rights of Americans to travel and to learn for themselves about conditons in Cuba. Mere assertions of national

security interests has never justified wholesale restrictions on fundamental rights. In United States v. Robel, 389 U.S. 258 (1967), in invalidating a statute which made it a crime for any member of the Communist Party to hold employment at a defense facility, the Court stated:

> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile. Id. at 264.

Americans need not rely on journalists or professional researchers or government press releases to learn about other countries. The Constitution gives all

Americans the opportunity to go and learn for themselves about the life, people and governments of foreign lands. Kent v. Dulles, 357 U.S. 116, 126-27. Only the most immediate and compelling circumstances can justify a restriction on the individual's right to travel and learn. Such circumstaces are not present in the case of Cuba today; perhaps the very freedom to travel to exchange information and to break down the barriers of suspicion bred from ignorance, will contribute to that day never arriving.

Respectfully submitted,

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No. 83-436

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

Donald Regan, Secretary of the Treasury,
Et Al., Petitioners

v.

Ruth Wald, Et. Al.,
Respondents

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

The Chicago Council of Lawyers

Interest of the Amicus[1]

The Chicago Council of Lawyers, a member bar association of the American Bar Association, submits this brief amicus curiae in support of Respondents. The Council, through the filing of amicus briefs and otherwise, has actively supported the exercise of constitu-

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[1]Letters of the petitioners and respondents giving their consent to file this brief have been filed with the Clerk of this Court.

tional rights to individual liberty and the observance of constitutional separation of powers. The Council views this case as implicating both constitutional liberty interests and questions of separation of powers, albeit in the context of a question of statutory construction. The Council also views the case as affecting the rights of its members to travel across international boundaries.

SUMMARY OF ARGUMENT

1. The right to travel abroad is a constitutional right protected by the Fifth Amendment which cannot be restricted without the express or implied approval of Congress. Treasury Department regulations prohibiting expenditures necessary to travel to Cuba effectively prohibit travel to Cuba by the vast majority of American citizens. Yet, Congress never granted the Executive branch

the sweeping authority to restrict travel abroad which Petitioners claim here.

The legislative history of the Trading With the Enemy Act and its subsequent amendments demonstrate that Congress has not expressly nor impliedly given the Treasury Department authority to restrict travel. Rather, the actions of Congress indicate that it believes that the TWEA cannot be used to restrict travel. In addition, Congress has clearly narrowed Executive authority to create and enforce area restrictions on foreign travel. Nor has the Treasury Department itself actively asserted the power it claims through its amendment of 31 C.F.R. 515.560--to restrict travel to a particular country.

Thus, since Congress has neither expressly approved nor acquiesced to a Treasury Department policy of restricting travel, the Treasury Department regulations are not statutorily authorized and therefore unconstitutional.

2. Travel abroad is a fundamental right which is closely related to rights protected by the First Amendment. This Court has consistently found that the Constitution protects the right to receive information and ideas. The importance of this right is not diminished simply because the Government's regulations prohibit travel through which citizens can obtain information, rather than regulate the information itself. The unique access to information that travel provides has been underscored in the decisions of this Court. It is especially important with respect to questions of foreign policy, since an informed citizenry may be the only effective restraint upon the Executive's to conduct foreign affairs. The regulation at issue effectively prevents United States citizens from making informed judgments regarding fundamental questions of their government's foreign policy towards Cuba.

Petitioners do not avoid the mandate of the Constitution by claiming that the regulations have only an incidental effect on travel. The immediate and direct effect of the regulations is to prevent travel to Cuba. As the Government itself has admitted, the regulations are a "ban on travel".

Finally, limitations on the right to travel are permissible only in situations which impose an imminent danger to national security or to the lives of American citizens. Since the travel at issue here involves neither consideration, the regulations are an unconstitutional limitation of the freedom of Americans to travel abroad.

I.

CONGRESS NEVER AUTHORIZED THE PRESIDENT TO RESTRICT TRAVEL UNDER THE TRADING WITH THE ENEMY ACT OF 1917.

The right to travel abroad is a "personal liberty protected by the Bill of Rights...." Aptheker v. Secretary of State, 378 U.S. 500, 516 (1964). Even when regulation of foreign travel is otherwise constitutional, decisions of this Court establish that the right to travel cannot be regulated without Congress' express authorization or implied approval where Congress has granted broad rule making authority specifically related to foreign travel. Haig v. Agee, 453 U.S. 280 (1981); Zemel v. Rusk, 381 U.S. 1 (1965). Because travel is a right protected by the Constitution, any grant of authority to the Executive branch must be narrowly construed. Kent v. Dulles, 357 U.S. 116, 129 (1958).

Petitioners argue that the authority delegated to the Executive to regulate trade

under Section 5(b) of the Trading With the Enemy Act of 1917 (TWEA), 50 U.S.C. App. Section 5(b), emcompasses regulation of travel related currency transactions which effectively prohibit travel to Cuba. To support this contention, Petitioners make note that such regulations had been published by the Treasury Department in 1963 and were not removed until 1977. But clearly, publication, standing alone, cannot create authoriztion where none exists. Moreover, the history of the TWEA as well as congressional action and intent with regard to travel restrictions, contradict Petitioners' claim.

Section 5(b), from which the Executive claims its authority to impose the restrictions at issue here, was intended to apply only to commercial and mercantile transactions, not to personal travel by American citizens. From the time of its passage, Section 5(b) was directed only at trade. While the statute

contains a comprehensive list of commercial transactions subject to regulation, and has been amended several times, it has never made mention of the regulation of transactions related to travel.[2] Moreover, in a report on the freedom to travel, a distinguished committee which included members of Congress and high level Executive department personnel concluded that the Trading With the Enemy Act (TWEA) "was never intended to be used

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[2]The debate and hearings prior to the passage of TWEA in 1917 focused on commercial and administrative issues such as patents, disposition of foreign shareholders' dividends, and questions involving international exchange and gold transactions. See e.g., Trading With the Enemy, Subcomm. on International Trade and Commerce, 94th Cong., 1st Sess. 52-58, 77-78, 185 (1976). Later amendments involved: adding the "hoarding" of gold to the list of regulated transactions, Second Liberty Bond Act of 1918, ch. 176 Section 5, 40 Stat. 966 (1918); broadening the TWEA to cover national emergencies so that the 1933 banking "emergency" came within its ambit, Emergency Banking Relief Act of 1933, ch. 1, Section 52, 48 Stat. 1 (1933); and adding regulation of transactions in stocks and bonds. Joint Resolution of May 7, 1940, ch. 185, 54 Stat. 179 (1940).

as a device for the regulation of travel or passports." Association of the Bar of New York, Freedom to Travel 72 (1958).[3]

Nor has Section 5(b) ever been enforced against persons who have openly travelled to countries which have been subject to TWEA embargoes. Department of Treasury officials, themselves, declined opportunities to prosecute such alleged violations of the Act. Id. When the Government did attempt to prosecute persons for traveling to restricted or embargoed countries, such as Cuba, it looked only to the provisions of the Passport Act. See, United States v. Laub, 385 U.S. 475 (1967). Moreover, the Justice Department

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[3]The committee which drafted the report included John Foster Dulles, the then Secretary of State, Senator Theodore Green, Representative William M. McCulloch, George C. Doub, Assistant Attorney General, Civil Division, Department of Justice, as well as legal staff from the State Department, Justice Department and Senate Judiciary and Foreign Relations Committees. Freedom To Travel, supra at xvii-xx.

acknowledged on several occasions after Laub that the Government lacked any authority to enforce restrictions on travel to Cuba.[4] Since neither the Treasury not Justice Departments attempted "actual enforcement" or actively asserted power to restrict travel under TWEA, there is no indication that such an Executive policy existed. See, Agee, 453 U.S. at 303. Consequently, any claim that Congress has authorized the regulation sub silentio is patently untennable.

Indeed, in stark contrast to the congressional acquiescence to the Executive's exercise of authority in Agee, Congress has been neither silent about, nor approving of, any prior exercise of travel restrictions

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[4]See Statement of A. William Olson, Asst. Atty. Gen., in Hearings on Restraints on Travel to Hostile Areas H.R. 1594 (Clean Bill H.R. 8023), H.R. 278, H.R. 297, H.R. 2691, H.R. 3999, H.R. 6047 before the Committee on Internal Security, House of Representatives, 93d Cong., 1st Sess. 58 (1973). See also, H.R. Rep. No. 92-1461, 92d Cong., 2d Sess. 7 (1972).

now claimed to be granted in TWEA. In fact, after the 1967 decision in Laub, members of Congress reacted to reports that hundreds of young Americans were traveling to Cuba and expressed frustration at the Government's inability, under then existing authority, to stop the continuing travel. For example, Representative Ichord complained that the Secretary of State was "powerless" to prevent travel to Cuba. 115 Cong. Rec. 34332 (1969). Faced with the absence of criminal sanctions to punish 213 United States citizens who travelled to Cuba to cut sugar cane, Senator Eastland published each of their names in order to identify them to "our citizenry". 116 Cong. Rec. 7465 (1970).

Moreover, Congress was not unmindful of the fact that the effect of the vast numbers of Americans who were traveling to Cuba to cut sugar cane was to undermine United States economic sanctions against

Cuba. Representative Adair remarked in the House of Representatives:

> "[I]t seems most self- defeating to permit Americans to lend assistance in the harvesting of the 1970 sugar crop...This, in my opinion, is sufficient justification for the introduction and passage of legislation which for the first time gives the Secretary of State authority to impose and enforce area travel restrictions."

115 Cong. Rec. 31622 (1969)(emphasis added).

Yet, despite the persistent congressional perception that the State Department had no authority to punish the travelers to Cuba, not one member of Congress ever called upon the Executive branch to prevent or sanction travel to embargoed countries under any purported TWEA authority.

The reason for this is simple. Congress assumed that no such authority existed. As the House Committee on Internal Security stated in its report on H.R. 8023, "[t]he Executive's existing authority to impose area travel restrictions in conducting the

Nation's foreign affairs is not enforceable because of the absence of penal sanctions." H.R. Rep. No. 93-248, 93d Cong., 1st Sess. 1 (1973). House Bill 8023 was only one of a number of unsuccessful bills introduced in Congress to give the Executive, for the first time, the very authority claimed here--the authority to impose criminal penalties for travel to restricted areas, specifically Cuba.[5] These bills would have been superfluous if the sanctions already existed under TWEA. Moreover, Congress rejected efforts to expand the Government's authority to restrict travel soley on the basis that "such travel would seriously impair the conduct of United States

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[5]Legislative measures were introduced in every Congress from 1958 to 1976 to provide for ciminal sanctions for violations of area restrictions. Note, Area Restrictions and the Right to Travel Abroad, 8 U. Calif. at Davis L.R. 401, 426-27 (1975). See e.g., S.806, S.1973, S.2287 and S.2315, 86th Cong., 1st Sess. (1959); S.3243, 89th Cong., 2d Sess. (1966); H.R. 8023, H.R. 16742, 93d Cong. 1st Sess. (1973).

foreign policy." H.R. 383 and H.R. 14893, 92d Cong. 2d Sess. (1972).

When Congress finally acted in 1978 to redefine the Executive's authority to impose area restrictions, it expressly and purposely narrowed that authority. Pursuant to the 1978 amendment to the Passport Act, area restrictions may only be imposed on passports for travel to "a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers." Foreign Relations Authorization Act of 1978, Pub.L. No. 95-426, Section 124, 92 Stat. 971 (codified as amended at 22 U.S.C. Section 211a).

Thus, not only is there simply no basis for a claim that "there was in reality any definite policy in which Congress could have acquiesced," Agee, 453 U.S. at 303,

but Congress has both affirmatively and impliedly indicated its view that the Executive has no authority to adopt any such policy. In fact, Congress has repeatedly rejected proposals to grant the Executive the kind of authority the Government now claims it had all along. In sum, the Tresury Department regulations prohibiting travel to Cuba are unauthorized and, thus, unconstitutional.[6]

II.

THE TREASURY DEPARTMENT REGULATIONS PROHIBITING EXPENDITURES NECESSARY TO TRAVEL TO CUBA VIOLATE THE CONSTITUTIONAL RIGHT TO TRAVEL ABROAD

Freedom to travel abroad "is a constitutional liberty closely related to the rights of free speech and association" embodied

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[6]Assuming arguendo, contrary to amicus' position, that such authority did exist under TWEA, amicus concurs with the court below that no such power was being exercised as of July 1977. Therefore, the authority to restrict travel through asset controls was not included in those authorities continued under the Grandfather Clause.

in the First Amendment. Aptheker, 378 U.S. at 517. The right to travel is a fundamental aspect of a citizen's liberty which is deeply engrained in our national heritage. It is also recognized as a basic human right by international accords.[7]

Because it is so vital to the exercise of political rights, the right to international

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[7]The Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations in 1948, provides in Article 12 of the International Covenant on Civil and Political Rights that the right to travel abroad "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others." G.A. Res. 2200(XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). Virtually identical provisions were incorporated into Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 222, and Article 22 of the American Convention on Human Rights adopted by the Organization of American States, signed Nov. 22, 1969. O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, doc. 21, rev.2. No such necessity, justifying restricting the right to travel, exists here. See pp. 28-35, infra.

travel can only be restricted where Congress has clearly authorized the limitation to preserve the national security or to protect the health and safety of American citizens. See e.g., Zemel, 381 U.S. 1 (1965); Agee, 453 U.S. 280 (1981). Such authorization and justification for infringing the constitutional right to travel abroad are not present here.

A. The Right To Travel Abroad Has Substantial First Amendment Implications and Is Fundamental To A Free Society

It is unarguable that "the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969). The significance of this protection was expressed by Mr. Justice White in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969):

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail....It is the right of the public to receive suitable access to social, political, esthetic, moral, and other

ideas and experiences which is crucial here.

The importance of this right is not diminished simply because the method of regulation prevents travel to obtain the information rather than regulating the information itself.[8]

The enormous powers of the Executive in the area of foreign policy are counterbalanced only by accountability to the citizens of the United States who are the ultimate judges of the wisdom of the policies adopted. As Mr. Justice Stewart concurring in New

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[8] In Zemel, this Court upheld a limitation on the right to travel even when the right asserted was linked to the right to access to information. The limitation was valid because it rested on the "weightiest considerations of national security." 381 U.S. at 16 (1965). Moreover, in Kleindienst v. Mandel, this Court specifically acknowledged the substantial First Amendment considerations of access to information present in the context of denials of visas to foreign visitors, but it found such considerations irrelevant to its inquiry since it was compelled to sustain Congress' plenary power to exclude aliens. 408 U.S. 753, 765 (1972). No such plenary power exists with respect to foreign travel by American citizens.

York Times Co. v. United States, 403 U.S. 713, 728 (1971) observed:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry--in an informed and critical public opinion which alone can here protect the values of democratic government.

Public access to information is thus especially important with respect to foreign policy issues.

The unique access to information that foreign travel provides enables citizens to evaluate their government's policies first-hand. This Court acknowledged this important interest in Kent, 357 U.S. at 127:

> An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Quoting Z. Chafee, Three Human Rights in the Constitution of 1787 197 (1956).

The ability of citizens to make informed

judgments about foreign policy issues is essential in the modern era when foreign policy decisions impact profoundly on the economic and social well being of all American citizens.[9]

Moreover, restrictions on travel to specific areas have particular implications for First Amendment Freedoms, since they effectively cut off an entire nation or region from view. In this respect, the right to travel to Cuba takes on even greater importance when one considers that the ability of Americans to engage in face to face dialogue with Cuban officials, scholars, and social leaders has been severely limited since 1981 by the State Department's policy of

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[9]American citizens must support foreign aid with their tax dollars. In addition, regulation of foreign trade substantially affects both industry and labor. Increasingly, foreign policy decisions pose serious moral questions to the American public as is evident in the agonizing debate over American aid given to governments which flaunt basic human rights.

denying visas to Cubans invited to speak in the United States.[10] Imposition of the travel restrictions challenged here thus closes the circle of isolation, foreclosing almost all contact between Americans and Cubans.

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[10] In September of 1981, the Government prevented four Cuban officials from attending a seminar organized, in part, by members of the United States Senate and House, which was to focus on United States/Cuban relations. N.Y. Times, Sept. 17, 1981, at A5, col. 2. The Government later refused to grant a visa to the Cuban Deputy Minister of Culture who was invited to attend an international film festival in Los Angeles. In announcing the denial, a spokesman for the Department of State indicated that "Cuban officials were normally banned [from the United States] unless they were involved in diplomatic discussions or attending international meetings such as the United Nations." N.Y. Times, Apr. 19, 1982, at A3, col. 3. Not only officials, but scholars also are barred entry. Visas were denied to two Cuban philosophers, invited to attend the American Philosophical Association's Eastern Meetings in December, 1982. N.Y. Times, Dec. 30, 1982, at. A5, Col. 5. Such visa denials are specifically authorized by the Immigration and Nationality Act of 1952, 8 U.S.C. 1182. In contrast, Congress granted no such authority to prohibit expenditures necessary for international travel at issue here. See supra at pp. 6-15.

United States relations with Cuba have been the subject of considerable controversy for the past two decades. Administrations have pursued differing policies. Under President Carter, the United States moved closer to normalized relations with Cuba;[11] President Reagan has moved the United States away from pursuing such negotiations.[12] It is precisely because the issue of United States-Cuban relations is so debatable that

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[11]In his statement before the House Subcommittee on Inter-American Affairs, Myles Frechette, Country Director for Cuban Affairs, Department of State, reported that between 1977 and 1980 the United States had opened "constructive lines of communication between Cuba and the United States" and that "[o]ur dialogue with Cuba has cost us little and has yielded some significant benefits." Impact of Cuban Soviet Ties in the Western Hemisphere, Spring 1980, Before the Subcomm. on Inter-American Affairs of the Comm. on Foreign Affairs, H.R. 86th Cong., 2d Sess. 70 (1980).

[12]Wayne Smith, chief of the United States diplomatic mission in Havana from 1979 until summer of 1982, described the policy of the Reagan administration toward Cuba as one which is "going in the opposite direction" from improved relations. N.Y. Times, Sept. 5, 1982, at A3, Col. 1.

it is all the more important that American citizens not be denied the right to visit Cuba, speak to the Cuban people, and inform themselves concerning what policy they believe is in the best interests of the United States to pursue.

B. The Government's Regulations Prohibiting Expenditures Necessary For Travel To Cuba Do Not Have Merely An "Incidental" Impact: They Effectively Bar Travel By the Vast Majority of Americans.

In its brief, the Government contends that the challenged regulations do not "regulate travel as such" but merely have "the incidental effect of making it harder for a person to go to a particular country." Brief of Petitioner at 53. Such an argument defies reason and denigrates the substantial liberty interest at stake. Prohibition of expenditures

necessary for travel prevents travel.[13]

Petitioner's reliance on Califano v. Aznavorian, 439 U.S. 170 (1978) for the proposition that regulations which "incidentally" effect travel are permissible is misplaced. In Aznavorian, the Court was faced with determining the constitutionality of a provision of the Social Security Act which provided that no person could receive Supplemental Security Income Benefits for a thirty day period, if the individual had been out of the United States for more than thirty consecutive days. Id. at 171. In upholding the regulation's constitutionality, this Court reasoned that the regulation did not prevent travel, it merely limited eligibility to a statutory benefit for a brief period after an extended

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[13]With the exception of the unusual circumstance that American visitors are invited guests for whom all travel, lodging and meals are paid by the Cuban government, all other travel not covered by one of the narrow exemptions is effectively prohibited.

absence from the United States. Id.

In contrast, the effect on travel of the Treasury Department's regulations at issue here could not be more direct. The regulations do not merely make it more difficult to travel to Cuba, they impose harsh criminal penalties for the expenditure of so much as a single dime in connection with such travel.[14] Not only is the substantial impact on travel self-evident, but Treasury Department spokesmen themselves have candidly characterized the regulations as a ban on travel.[15]

Moreover, contrary to the Government's

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[14]Violation of the Treasury Department regulations promulgated under the Trading With the Enemy Act is a felony punishable by imprisonment for not more than ten years and/or a fine of not more than $50,000. 50 U.S.C. App. Section 16.

[15]Announcing the new regulations in April, 1982, assistant Treasury secretary John Walker stated "We can ban the travel and we are banning it." Chi. Sun Times, Apr. 20, 1982, at 15, col. 2.

contentions, the regulations are not tailored to prevent only business and tourist travel. Excluded from the categories for which licenses are granted are tens of thousands of Americans who have an interest in traveling to Cuba, not to enjoy its beaches, but to learn about Cuban society and culture. For example, the regulations specifically prohibit "study visits..in connection with pre-college or undergraduate college course work." 31 C.F.R. 515.560(h)(2). Indeed, the record in this case shows that the Treasury Department denied licenses when sought by persons for such educational purposes in 1982.[16] Also specifically excluded is travel for the purpose of "research for personal satisfaction only." Id.

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[16]A blanket license was denied to the Center for Cuban Studies to permit 98 individuals to attend an interdisciplinary study tour. See J.A. 69-70. And a license was denied for a study tour for a group of high school students. See J.A. 82-83.

The regulations also arbitrarily limit travel which is permitted for "professional research". Under the regulations a professor of history could travel to Cuba to engage in full-time research which is specifically related to Cuba in the area of his or her specialty, but the same professor could not travel to Cuba for the purpose of "attending general lectures devoted to Cuban culture and contemporary life." 31 C.F.R. 515.560(h)(5). Nor could the professor, after completing the permitted research, remain in Cuba to attend more general lectures which might enrich his or her understanding of Cuban society. Id.

Similarly, attorney members of the Chicago Council of Lawyers, if invited to attend an international seminar on maritime law to be held in Havana would be barred from attending. Permission might be granted, however, if the seminar were exclusively

pertaining to "The Maritime Law of Cuba". Id. On their face, such regulations suppress knowledge not tourism.

The Government further attempts to trivialize the substantial interests at stake here by equating expenditures necessary for travel with the purchase of Cuban cigars. Brief for Petitioners at 14. The equation is spurious. At issue here is the ability of the Executive to curtail a freedom basic to the values of our society in the absence of any compelling emergency and without the express or implied authorization of Congress.

C. Only the Weightiest Considerations of National Security, Not Present Here, Justify Limiting the Right To International Travel.

The Government contends that it may regulate travel simply as a tool to shape foreign policy. Brief of Petitioners at 35. The Government's contention not only

goes well beyond the prior rulings of this Court but would serve to undermine the fundamental liberties our foreign policy is presumably designed to protect.

Only circumstances posing an imminent threat to national security or to the lives of American citizens justify governmental limitations on the right to international travel. Zemel, 381 U.S. at 16; See also, Agee, 453 U.S. at 307. In Zemel, exigent circumstances surrounding the Cuban missile crisis were characterized by this Court as involving the "weightiest considerations of national security" and were, therefore, sufficient to justify restrictions on travel to Cuba in late 1962. 381 U.S. at 16; see also, Mandel, 408 U.S. at 764. Moreover, in 1978, when Congress amended the Passport Act, it specifically defined these "weighty considerations" by limiting passport area restrictions to the emergencies of "war",

"armed hostilities" or "imminent danger to the public health or the physicial safety of United States travellers." Foreign Relations Authorization Act of 1978: Pub.L. No. 95-426, Section 124, 92 Stat. 971 (codified as amended at 22 U.S.C. Section 211a).

Noting the 1978 amendment to the Passport Act, this Court upheld revocation of a passport in extraordinary circumstances where the person travelling posed a serious threat to national security. Agee, 453 U.S. at 285. In Agee, the passport holder's intentional identification of United States intelligence agents abroad resulted in episodes of violence against the persons identified and also "jeopardized the security of the United States". Id. at 308.

The Government does not argue, nor could it, that travel to Cuba poses a substantial threat to the national security or endangers the lives of American citizens. The justifi-

cation given for imposing restrictions on travel to Cuba in 1982 is simply that they serve foreign policy objectives of this administration relative to Cuba.[17] Petitioner's Brief at 34-35. But "foreign policy", like "war power", "cannot be invoked as a talismanic incantation to support any exercise of...power which can be brought within its ambit."

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[17]Although the government attempts to use the phrases "national security" and "foreign policy" interchangeably, no direct effect on national security resulting from travel to Cuba is demonstrated. At best, prohibition of travel may have an indirect and minimal effect on the administration's foreign policy objectives. Moreover, officials within the present administration have questioned factual assumptions underlying these objectives. For example, the principle rationale given for curtailing travel in 1982 was that Cuba was "increasing its support for armed violence in this hemisphere," and prohibitions on expenditures necessary for travel would reduce Cuba's ability to provide such alleged support. New York Times, April 20, 1982, at A1, col. 4. Wayne Smith, the chief of the United States' diplomatic mission in Havana at the time, has stated, however, that "U.S. evidence of (Cuban) arms shipments has never been solid" and that "this factor in the equation has been greatly exaggerated." New York Times, September 5, 1982, at 3, col. 1.

United States v. Robel, 389 U.S. 258, 263-64 (1967). To the contrary, this Court has refused to grant virtually unlimited discretion to the Executive, when that claim is based solely on foreign policy considerations. Id., see also, Youngstown Sheet and Tube Co.v. Sawyer, 343 U.S. 579 (1952).

Moreover, Congress has specifically asserted that the right to travel is to be insulated from the vacillations of foreign policy. The Senate Foreign Relations Committee Report accompanying the 1978 Amendment to the Passport Act, which limited the President's authority to impose area restrictions on travel states:

> [T]he committee believes that the freedom-of-travel principle is sufficiently important that it should be a matter of law not dependent upon a particular Administration's policy.

S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978). By imposing restrictions on travel to Cuba as an "instrument" of foreign

policy, the Executive branch has contradicted the express will of Congress.

While it is not the role of this Court to judge the wisdom of a particular policy, it must not let foreign policy considerations routinely sweep aside constitutional freedoms. Liberty interests must be protected even in difficult times. As this Court has observed:

> It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties...which makes the defense of the nation worthwhile.

United States v. Robel, 389 U.S. at 264 (1967).

Congress' concern that freedom to travel should not be vulnerable to changes in administration policies is particularly pertinent to the circumstances in this case. President Carter removed all restrictions in recognition of the freedom to travel principle. The Presidential News Conference of March 9, 1977, 13 Weekly Comp. of Pres. Doc. 328-29

(1977). The principle endures. It should not be abandoned merely to accommodate shifts in perspectives.

To the extent that prohibiting expenditures necessary for travel to Cuba serves any legitimate foreign policy objectives, the impact is at best speculative and minimal. There is no evidence that regulations will have more than a minimal effect on the Cuban economy. By the Government's own calculations, the regulations would affect less than 40% of travel from the United States to Cuba. N.Y. Times, Apr. 20, 1982, at A9, col. 4. Indeed, at the time the Government acted to restrict the right of Americans to travel to Cuba it had not even made an estimate of the regulation's impact on Cuba's earnings. Chi. Sun-Times, Apr. 20, 1984, at 15, col. 2. The cost in constitutional liberty, however,

is calculable and substantial. When such regulation is not authorized by Congress, nor justified by national emergency, it comes at a price democracy cannot afford.

CONCLUSION

The judgment of the First Circuit Court of Appeals should be affirmed.

Dated: March 14, 1984

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No. 83-436-CFX
Status: GRANTED

Title: Donald Regan, Secretary of the Treasury, et al., Petitioners
v.
Ruth Wald, et al.

Docketed:
September 14, 1983

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Boudin, Leonard B.

Entry	Date	Note	Proceedings and Orders
1	Sep 14 1983	G	Petition for writ of certiorari filed.
2	Jun 23 1983		Application for stay filed.
3	Jun 24 1983		Response requested - Due June 28, 1983 - 12:00 p.m.
4	Jun 24 1983		Temporary stay granted by Brennan, J. - Distributed for Conf. 6/29.
5	Jun 28 1983		Memorandum of Ruth Wald in opposition filed.
6	Jul 6 1983		Application for stay GRANTED BY ORDER OF THE COURT.
8	Oct 5 1983		Order extending time to file response to petition until October 27, 1983.
9	Oct 27 1983		Brief of respondents Ruth Wald, et al. in opposition filed.
10	Nov 2 1983		DISTRIBUTED. November 23, 1983
11	Nov 7 1983	X	Reply brief of petitioner Regan. Sec. of the Treasury filed.
12	Nov 28 1983		Petition GRANTED.
			**********
14	Jan 4 1984		Order extending time to file brief of petitioner on the merits until January 27, 1984.
16	Jan 4 1984		Order extending time to file brief of respondent on the merits until March 14, 1984.
17	Jan 11 1984		Application for leave to file petitioners' brief on the merits in excess of page limitations, and order granting
18	Jan 11 1984		same by Brennan, J., Jan. 12, 1984, not to exceed 60 pages.
19	Jan 23 1984		Application for leave to file respondents' brief on the merits in excess of the pages filed with WJB (A-591).
20	Jan 24 1984		Order granting same not to exceed 60 pages by Justice Brennan.
22	Jan 27 1984		Brief of petitioner Regan. Sec. of the Treasury filed.
23	Jan 27 1984		Joint appendix filed.
24	Feb 10 1984		Record filed.
25	Feb 10 1984		Certified original record & C.A. proceedings received.
26	Mar 15 1984		Brief of respondents Ruth Wald, et al. filed.
27	Mar 14 1984		Brief amicus curiae of National Council of Churches etc, et al. filed.
28	Mar 14 1984		Brief amicus curiae of Chicago Council of Lawyers filed.
29	Mar 20 1984		SET FOR ARGUMENT. Tuesday, April 24, 1984. (1st case)
31	Mar 26 1984		CIRCULATED.
32	Apr 13 1984	X	Reply brief of petitioners Regan. Sec. of the Treasury filed.
33	Apr 24 1984		ARGUED.